FOREST SERVICE REGULATORY ROADBLOCKS TO PRODUCTIVE LAND USE AND RECREATION: PROPOSED PLANNING RULE, SPECIAL-USE PERMITS, AND TRAVEL MANAGEMENT

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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OVERSIGHT HEARING ON "FOREST SERVICE REGULATORY ROADBLOCKS TO PRODUCTIVE LAND USE AND RECREATION: PROPOSED PLANNING RULE, SPECIAL-USE PERMITS, AND TRAVEL MANAGEMENT."

Tuesday,, November 15, 2011
U.S. House of Representatives
Subcommittee on National Parks, Forests and Public Lands
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:09 a.m. in Room 1324, Longworth House Office Building, Hon. Rob Bishop [Chairman of the Subcommittee] presiding.

Present: Representatives Bishop, Duncan, Broun, McClintock, Tipton, Labrador, Noem, Grijalva, Holt and Sarbanes.

Also Present: Representatives Amodei and Lummis.

Mr. BISHOP. The Subcommittee will come to order. The Chairman notes the presence of a quorum. The Subcommittee on National Parks, Forests, and Public Lands is meeting today to hear testimony on regulatory roadblocks that impact productive land use and recreation in our national forests.

Under Committee Rule 4[f], the opening statements are limited to the Chairman and the Ranking Member of the Subcommittee so that we can hear from our witnesses more quickly. However, I ask unanimous consent to include any other Members' opening statements in the hearing record if submitted to the clerk by the close of business today. Hearing no objection, so ordered.

I also ask unanimous consent that the gentleman from Nevada, Mr. Amodei, be allowed to sit on the dais and take part in this proceeding when he arrives. Again, without objection, so ordered.

STATEMENT OF HON. ROB BISHOP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. BISHOP. Let me begin by simply saying Federal regulations, particularly with regard to land use, is a topic of a great deal of debate before this Subcommittee. Given the Federal Government's ownership of over 600 million acres of abundant and accessible natural resources and natural wonders, we must be able to ensure that policies are put into place so that we can wisely and prudently balance the many competing and worthy uses of these lands and resources.

We continue that discussion today with the Forest Service and actions the agency is taking with regard to the 155 national forests and 20 grasslands the public has entrusted to its care. Those who come to join us on the panel and in the audience today are on pins and needles—no pun intended—in anticipation of the new planning rule that will dramatically affect the way those 175 units manage their resources.

Going back almost two years in the development of the proposed planning rule, many user groups and stakeholders have called on the Forest Service to correct the many problems with the Forest Service planning that led former Chief Dale Bosworth to attribute the much used, yet appropriate, phrase "analysis paralysis" to the management of our Federal lands.

However, as witnesses will tell us today, we fear that much of this input has fallen on deaf ears as the rule that was proposed on Valentine's Day of this year will continue, if not exacerbate, the downward spiral of management of our national forests. My fear is—to be honest, Mr. Tidwell, I am grateful that you are here with us today—that we are on the road to a confrontation between Congress and the Forest Service and indeed those who live by these areas and use these areas if some accommodations are not made and reconsidered.

Whether it is various insects and disease infestations, unnaturally overgrown forest stands, catastrophic wildfire or any combination of such, no one can deny that our national forests are in dire straits. National forests are an important and necessary source of economic activity and recreation for local communities and the public. This resource needs to be managed for the benefit of all the users—of all the users—and this cannot be done under a planning process that leaves land managers spinning their wheels on solutions in search of problems and still winding up in court at the end of the day.

While I understand the agency has every intention of finalizing a rule as we speak, I hope that the testimony presented today will take into account to ensure that the final planning rule works for the stakeholders and all stakeholders that it intends to serve.

I notice the other day the Forest Chief did announce that there would be a new committee to assist in the implementation of the plan. My hope is also that you would use that group to look at the rule itself and to see where there may be some problems in that rule before you actually start on the implementation of it.

I also look forward to hearing the testimony on the ongoing implementation of the Travel Management Rule as well as recent concerns with special use permits and water rights. My colleague, Mr. Tipton, is here today, and recently he wrote Secretary Vilsack a letter highlighting this issue that needs to be addressed, desperately needs to be addressed. Water rights are a sacred issue in the West, and any attempt to upset the balance of state water law and primacy is something that will be taken very seriously by this Congress.

With that, I thank our witnesses for being here, and I now recognize the Ranking Member, Mr. Grijalva, for any opening statement that he may have.

STATEMENT OF HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you, Mr. Chairman. Mr. Chairman, Congress has tasked the Forest Service with a difficult balancing act. Among the requirements placed on the agency in the National Forest Management Act is "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." The

Forest Service must determine forest management systems, harvesting levels and procedures in the light of all uses.

In passing such legislation, we in Congress have the luxury of simply requiring the Forest Service to strive for balance among a variety of competing and, at times, conflicting multiple uses. The agency itself has to deal with achieving such balance on the ground, in the real world, in thousands of different resource management decisions on 225 million acres.

The Forest Service's Proposed Planning Rule, Travel Management Rule, and system for issuing special use permits are not perfect. Each is shaped by public input, scientific research and litigation from a variety of types of plaintiffs and the pros and cons of a bureaucratic decisionmaking process. But while these and other Forest Service policies are not perfect, they are also not part of a vast conspiracy to lock up Federal land. They are not ill informed, nor are they developed in secret.

A good use of our time today would be to question Chief Tidwell, former Chief Dombeck, and the other witnesses regarding how the latest versions of these policies were developed and how they align with existing Congressional mandates.

A poor use of our time today would be to play gotcha by asking the Chief to respond to questions regarding the merits of an individual road closure or specific use permits or individual planning outcomes. To legislate on general principles but then evaluate using specific, unproven anecdotes is inherently unfair.

I look forward to hearing from my colleagues, from the Chief, former Chief Dombeck and other witnesses joining us today regarding the difficult balancing act in which the Forest Service is engaged. The Proposed Planning Rule, Travel Management Rule and special use permit system are works in progress, and hopefully these and other tools will enable the agency to achieve the significant goals set for the Forest Service by Congress on behalf of the American people.

Thank you, Mr. Chairman. I yield back.

[The prepared statement of Mr. Grijalva follows:]

Statement of The Honorable Raúl M. Grijalva, Ranking Member, Subcommittee on National Parks, Forests and Public Lands

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Mr. BISHOP. Thank you, Mr. Grijalva. I appreciate that.

We now have the opportunity of hearing from the first panel of witnesses that we have who have taken their place appropriately at the table. We have from my left to right Chief Tom Tidwell of the U.S. Department of Agriculture Forest Service; Margaret Soulen-Hinson, who is the President of the American Sheep Industry Association and the Public Lands Council; Scott Horngren, who is with the American Forest Resource Council, Federal Forest Resource Coalition; Greg Mumm, who is the Executive Director of the Blue Ribbon Coalition; and Dr. Ron Stewart, who is with the National Association of Forest Service Retirees.

So we appreciate you all being here. Like all the witnesses who will be here today, your written testimony is already included in the record, so we will take your oral testimony at times here.

First of all, for those of you who have not been here before, the timers in front of you, your oral testimony has five minutes to be given. The green means the time is on and running down. When it hits yellow you have one minute left, and when it is red you stop.

Now, Chief Tidwell, I realize that we are giving you three different topics to talk at. If you would like a little bit of extra time, I will understand that if you want to hit all three topics first. If you want to do them individually, then we can do that, assuming of course that bountiful is solved by the end of the day as well as the rules being changed. Is that a fair enough deal?

Mr. TIDWELL. Yes.

Mr. BISHOP. OK. Especially the bountiful part of it.

Mr. Amodei, we have already had unanimous consent to have you join us on the panel. We appreciate you being here.

Mr. AMODEI. Thank you, Mr. Chairman.

Mr. BISHOP. If you would actually like to sit closer to us? In fact, all of you don't have to be that far away. I did shower this morning. If you would like to come closer, feel free to do so.

All right. With that, Chief Tidwell, it is good to see you again. Make sure you pull the microphone right up to you if you would. We enjoyed you so much when you were working with us in Utah. It is nice to have you back here in Washington. Go for what time you need to go through all three of those issues.

STATEMENT OF TOM TIDWELL, CHIEF, U.S. FOREST SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE

Mr. TIDWELL. Well, thank you, Mr. Chairman, Members of the Subcommittee. I also thank you for the opportunity to be here today to discuss with you our proposed planning rule, the Travel

Management Rule that we have been implementing now for a few years and then special use management on the national forests.

First, I will talk about the proposed planning rule. We need a planning rule that requires less process, it costs less and still provides the same or greater level of protections that the 1982 rule does. A lot has changed since 1982, and we have been trying to revise the planning rule for two decades, because early on we recognized the amount of unnecessary analysis that was required in the 1982 rule.

The 1982 rule is very time-consuming, it is inefficient, and on average it has taken five to seven years or much longer to revise a forest plan. We need a new rule that focuses on actively managing our forests to make the forests more resilient to insect and disease outbreaks, to wildfire, to the invasives we are experiencing today, while providing a full range of multiple uses.

Now, to develop this new planning rule, this new framework, we created the most open, transparent, collaborative process ever tried to work with the public to develop this new rule. We had numerous national, regional collaborative roundtables around the country, along with the public forums in many of our communities. We expanded the tribal consultation. This resulted in over 300,000 comments on our proposed rule.

Now this rule will be better than the 1982 rule because it reduces the time to complete a revision from that five to seven years down to two to four years. It eliminates some of the redundant, inefficient and unnecessary analysis that is required in the 1982 rule. It eliminates alternatives that are not even feasible and would never be considered. It eliminates the requirement to determine population trends of some species using management indicator species.

The new rule requires collaboration, public participation throughout the process, and it focuses on restoration of our forests and grasslands, not just on mitigation and restriction like so much of the 1982 rule does. It provides for multiple use objectives throughout the planning process, and it provides for the active management that is necessary to restore our forests and grasslands, provide the recreational opportunities, provide the habitat for wildlife and fish, which is going to result in more work, more jobs and healthier forests.

This proposed rule will address diversity by providing for the ecological conditions, providing the habitat that supports diversity, not from counting species. It will increase monitoring while reducing our costs with monitoring, and it provides for national consistency through required components but allows the flexibility to develop these components to address local conditions and will use a predecisional review process instead of the time-consuming appeals process. This has worked well for us with our Healthy Forest Restoration Act projects, and it aligns very well with our collaborative approach.

In 1982, we developed a rule to implement the National Forest Management Act that focused on restricting activities, mitigating impacts. This new rule will focus on restoring and maintaining the health and resiliency of our forests and grasslands. It is a rule that

will require less process, it will cost less and it will provide for that same or higher level of protections.

Now, to move on to our Travel Management Rule, one of the key opportunities provided in the National Forest System is for outdoor recreation. At the Forest Service we manage over 373,000 miles of maintained roads and over 152,000 miles of trails, but one of the issues with that travel system is the resource impacts that occur not only from the roads but from cross-country travel, and that is why back in 2005 Chief Fidel Bosworth provided the direction for us to create the Travel Management Rule that had two purposes.

The purpose of the rule is to provide a consistent approach to providing for motorized recreational access by identifying a system of motorized routes that are available for the public, and will be available in the future, and reducing resource impacts that were primarily from cross-country travel.

Now, about 77 percent of our forests have completed this motorized vehicle use map that identifies a system of routes and trails that is currently open, and now we continue to work on identifying the proper sized road system that we need to be able to access the national forests for management and for recreational access.

And then in general, just on special uses at the Forest Service we manage approximately 74,000 special use authorizations and each year receive over 6,000 new applications. We take a consistent approach with these by using a set of terms and conditions to authorize lands that are covered by special use permits. These terms and conditions are designed to protect the public's interest, provide for public safety and provide protections for water, fish and wildlife habitat and recreational values.

These special uses provide a lot of benefits to the public, whether it is communication towers where there are transmission lines or a variety of recreational experiences that are provided across the National Forest System. We expect that the rate of applications is going to continue to increase, and we will continue to have the challenge of timely processing of applications.

It is one of the things that we rely on the cost recovery rule that we have in place that allows us to be able to in some cases recover some of the costs of processing these permits so that we could be more timely and be able to provide much better public service, and because of the cost recovery rule that we have had in place now for almost 10 years we have significantly reduced the backlog of applications and reduced the amount of time to process these permits.

And with that, Mr. Chairman, thank you again for your time this morning, and I look forward to answering your questions.

[The prepared statements of Mr. Tidwell follow:]

Statement of Thomas Tidwell, Chief of the USDA Forest Service, Concerning "Forest Service Regulatory Roadblocks to Productive Land Use and Recreation: Proposed Planning Rule, Special-Use Permits, and Travel Management"—Part 1: The USDA Forest Service Planning Rule

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you today to provide the Department's view on the Forest Service's proposed planning rule, published on February 14, 2011. We appreciate the Subcommittee's interest in a matter of great import to the Agency and Department.

As a result of extensive collaboration and public involvement, the Forest Service received around 300,000 comments during the 90-day public comment period on the proposed rule and draft environmental impact statement. We have reviewed and

analyzed the comments in the development of the final rule. We expect to publish the final environmental impact statement and final rule late this year or early in 2012.

In the 193 million acres of forests, grasslands and prairies that make up our National Forest System (NFS), the citizens of the United States are blessed with some of the most diverse, beautiful, and productive landscapes and watersheds on the planet. As required by the National Forest Management Act of 1976 (NFMA), land management plans for each forest and grassland provide a framework for integrated resource management and guide project and activity decisionmaking on a unit. The planning rule provides the overarching framework for individual NFS units to use in developing, amending, and revising land management plans to maintain, protect, and restore NFS lands while providing for sustainable multiple uses.

Planning Rule History

Currently, the Agency is using the procedures of a planning rule developed in 1982, which has guided the creation of every land management plan, revision or amendment to date. However, over the past thirty years, much has changed in our understanding of how to create and implement effective land management plans, and in our understanding of science and the land management challenges facing Forest Supervisors.

Ecological, social, and economic conditions across the landscape have altered. New best practices and scientific methods have evolved. And so has the country's understanding of and vision for the multiple uses and benefits provided by NFS lands.

Additionally, modifying land and resource management plans using 1982 rule procedures is often time consuming, costly and cumbersome. Because of this, units often wait until circumstances require a complete overhaul, rather than update plans incrementally, as new information is obtained or conditions change. This approach has made it challenging to keep plans current and relevant. Of the 127 land management plans for NFS lands, sixty-eight are past due for revision, meaning that they are fifteen years old or more.

Beginning as early as 1989, the Department and Forest Service have made numerous attempts to review, revise and modernize the planning rule. After two proposals in the 1990s, a final rule was published in 2000 to replace the 1982 regulations. That rule was challenged in court, and an internal review concluded that the number and specificity of its requirements were beyond the Agency's fiscal and organizational capacity to successfully implement. A new planning rule was developed and published in 2005, and a revised version in 2008, but each of those rules was held invalid by a Federal District Court on grounds that it violated National Environmental Policy Act requirements for analyzing environmental impacts, among other findings. The 2000 rule, which was never invalidated by a court, is the rule that is currently in effect. The Forest Service is utilizing the transition provisions from the 2000 rule for plan revisions and amendments pending finalization of a new rule. These transition provisions allow for use of the procedures from the 1982 rule.

The instability created by the history of the planning rule has had a significant negative impact on the Forest Service's ability to manage the NFS and on its relationship with the public. At the same time, the vastly different context for management and improved understanding of science and sustainability that has evolved over the past three decades creates an urgent need for a meaningful, durable, and implementable 21st century planning framework that will ensure that the Agency responds to new challenges and management objectives for NFS lands in a consistent way.

Collaboration and Public Participation

Because of the planning rule's history and the high degree of interest in management of the NFS, the Department and Forest Service decided to take a different approach to developing this new planning rule. We strongly believe that involving the public through a participatory, open, and meaningful process has been the best way to develop the rule. Our goal has been to learn from the previous efforts, and to listen to input from the public, Agency employees, other governmental representatives, and internal and external scientists to develop a rule that endures.. As a result, the proposed rule issued in February 2011, and the final rule we are developing now, are the product of the most participatory and transparent planning rule development process in Forest Service history.

The development of the 2011 proposed rule was informed by 26,000 public comments made on the Notice of Intent (NOI); a Science Forum with panel discussions from 21 scientists; regional and national roundtables held in over 35 locations and attended by over 3,000 people; regional and national roundtables and 16 government-to-government consultations with Tribes; and over 300 comments on a plan-

ning rule blog developed to reach people online. The Agency and Department also reviewed previous rules and planning efforts, current science, and best practices being implemented on NFS lands; worked closely with other agencies; and actively engaged and sought feedback from Forest Service employees.

After the proposed rule was published in February 2011, we took the unprecedented step of hosting another series of meetings to provide the public with information about the proposal in order to help inform their review of the proposed rule and the Draft Environmental Impact Statement (DEIS). We held 29 national and regional public forums that were attended by over 1,300 people. Some of these forums were presented through video teleconferencing, reaching 74 locations across the country in all. In total we received 300,000 comments on the proposed rule and the DEIS during the 90-day comment period.

The Department and Forest Service believe that our approach and commitment to meaningful public engagement sets a new standard for public land management, and we are continually learning as we travel this path. Above all else, as we saw so many people take the time to come out to workshops on their local units, participate via the internet, or submit comments, we have been gratified to see once more how people truly cherish their National Forests and Grasslands and care deeply about their management.

The New Rule

The Department and Forest Service used the input we received through our public involvement process to develop the proposed rule and DEIS, and we are currently working to make further improvements to the rule based on the comments received on the proposed rule and DEIS. Because the rule is currently in the clearance process, I cannot give a definitive statement as to what the final rule will say.

That said, we believe the new rule will correct the inefficiencies of the 1982 planning procedures and provide a modern framework for planning in order to sustain and restore the health and resilience of our National Forests. The goal is to produce an efficient planning process to guide management of NFS lands so that they are ecologically sustainable and contribute to social and economic sustainability, with resilient ecosystems and watersheds, diverse plant and animal communities, and the capacity to provide people and communities with a range of social, economic, and ecological benefits now and for future generations.

The planning framework in the new rule would help the Agency provide clean water, habitat for diverse fish, wildlife, and plant communities, opportunities for sustainable recreation and access, and a broad array of other multiple uses of NFS lands, including for timber, rangeland, minerals and energy as well as hunting and fishing, wilderness, and cultural uses.

We intend to emphasize integrated resource management so that all relevant elements of the system are considered as a whole, instead of as separate resources or uses. We are considering the inclusion of requirements in the new rule to sustain and restore the health and resilience of our National Forests and watersheds. There would be a strong emphasis on protecting and enhancing water resources, including important sources of drinking water for downstream communities.

We are also considering the inclusion of requirements in the new rule to provide for diversity of plant and animal communities, and would be designed to provide habitat to keep common native species common, contribute to the recovery of threatened and endangered species, conserve candidate species, and protect species of conservation concern. The new rule would provide the same or better level of protection as the 1982 rule while removing the problematic provisions of the 1982 procedures, such as requirements for management indicator species (MIS), which have been proven cumbersome, ineffective and do not reflect the latest science.

We are also considering the inclusion of requirements in the new rule to contribute to social and economic sustainability. Plans would be required to provide for sustainable recreation, and to protect cultural and historic resources. Planning would consider and provide for a suite of multiple uses, including ecosystem services, watershed, wildlife and fish, wilderness, outdoor recreation, energy, minerals, range, and timber, to the extent relevant to the plan area. Plans would also guide the management of timber harvest on NFS lands.

The new rule would create a framework that allows adaptive land management planning in the face of climate change.

We intend to create a more efficient and effective planning process through an adaptive framework of land management assessment, planning and monitoring. This framework is intended to assist Forest Supervisors to adapt plans to reflect new information and changing conditions. Information developed in each phase would inform the public and feed into the next phase, building a strong base of information and public input that would support a shared understanding of and vision

for the landscape. Responsible officials would then be able to using monitoring data and other sources of information to amend plans and keep them current and effective.

The new rule would strengthen public engagement throughout the planning process, for which we are considering specification of numerous opportunities for meaningful dialogue and input. Responsible officials would be required to seek input from the public, consult with Tribes, encourage participation by youth, low-income populations, minority groups, and affected private landowners, and seek input from and coordinate with related planning efforts by other government entities including Tribes, States, counties, local governments, and other Federal agencies.

Additional direction we are considering for the new rule would be to use the most accurate, reliable and relevant scientific information available to inform the planning process. The appropriate interpretation and application of science provides the foundation for planning, with other forms of information, such as local and indigenous knowledge, public input, agency policies, results of monitoring, and the experience of land managers also taken into account in determining how to accomplish desired outcomes.

The strategy we are considering for monitoring under the new rule would take place at the unit level and at a broader scale. Monitoring would be a central part of both plan content and the planning process, allowing responsible officials to test assumptions, track changing conditions, measure effectiveness in achieving desired outcomes, and feed new information back into the planning cycle so that plans and management can be changed as needed.

We are also considering a requirement in the new rule that NFS lands be managed in the context of the broader landscape. While the Forest Service does not intend to and cannot direct management of lands outside the NFS, under the new rule, responsible officials would use assessments, monitoring and public engagement to create a continually evolving understanding of conditions, trends, and stressors both on and off NFS lands, and would work in the planning phase to respond to changing conditions across the landscape, and coordinate, where appropriate and practicable, with other land managers and owners to accomplish shared objectives.

Conclusion

We received a wide variety of public comments on the proposed rule and the draft environmental impact statement. We are coming to the end of our work on finalizing the rule. We are committed to creating a final rule that will help the Forest Service be more effective in its task of restoring and protecting our natural resources, support communities, and adapt to changing conditions. It represents our desire to create a modern and efficient planning rule based on science, public input, and Agency experience.

Management of America's 193 million acres of national forests and grasslands is enormously important for present and future generations. The Department's goal is a collaboratively developed, meaningful and enduring planning rule and a more efficient, effective, and participatory land management planning process.

This concludes my prepared statement, and I would be pleased to answer any questions you may have.

Statement of Tom Tidwell, Chief, Forest Service, United States Department of Agriculture, Concerning Forest Service Regulatory Roadblocks to Productive Land Use and Recreation: Proposed Planning Rule, Special Use Permits, and Travel Management—Part 2

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present the Agency's views regarding the administration of special uses on National Forest System (NFS) lands.

The Forest Service manages approximately 74,000 special use authorizations. Special use authorizations allow for the use of NFS lands for numerous purposes to benefit the public. Types of special uses range from communications sites, transmission lines, and other energy-related uses to public service facilities such as ski areas, resorts, and marinas to services such as outfitting and guiding. There are 180 types of special uses.

Consistent with the Forest Service's statutory authorities to manage NFS lands, special uses are authorized utilizing standard forms that contain provisions to protect the environment, including fish and wildlife habitat, air and water quality, and esthetic values; lives and property; and other preexisting lawful users of NFS lands. In addition, provisions in special use authorizations protect Federal property and

economic interests, provide for effective management of NFS lands, and otherwise protect the public interest.

The special uses program provides significant public benefits. Numerous energy-related pipeline and transmission line rights-of-way cross NFS lands, and numerous relay towers for communications uses are located on NFS lands. Private businesses and non-profit entities provide approximately half of the recreation opportunities on NFS lands, including 122 ski areas, 260 resorts, 76 marinas, 297 organizational camps, 294 concession campground operations, 5,000 outfitting and guiding operations, and nearly 1,000 recreation events each year.

Some of these uses, such as pipeline and transmission line rights-of-way, outfitting and guiding, and communications sites, are also conducted on lands managed by the United States Department of the Interior, Bureau of Land Management (BLM), under the same statutory authority. The Forest Service coordinates extensively with BLM to realize efficiencies and consistency in regulations, land use instruments, and other aspects of management of these programs. Holders of Forest Service and BLM land use authorizations benefit from this interagency coordination.

Forest Service special uses generate approximately $76 million in land use fees annually. The Forest Service is authorized to retain land use fees charged for organizational camps, commercial filming, outfitting and guiding, and recreation events to cover some of the costs to administer those uses.

Special uses provide many benefits to the American public and are one of the many ways that NFS lands provide resources and services. Special uses provide business opportunities for large and small companies, thereby serving the national and local economies. The public benefits greatly from this program by receiving services which could not be provided by the Forest Service.

This concludes my prepared statement and I would be pleased to answer any questions you may have.

Statement of Tom Tidwell, Chief, Forest Service, United States Department of Agriculture, Concerning Forest Service Regulatory Roadblocks to Productive Land Use and Recreation: Proposed Planning Rule, Special Use Permits, and Travel Management—Part 3

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify before you today on travel management on National Forest System (NFS) lands. I would like to update the Committee on the status of implementation of the Forest Service's travel management rule. Thank you for this opportunity.

Background

The Forest Service manages 155 national forests and 20 national grasslands, in 42 States and the Commonwealth of Puerto Rico. By law, these lands are managed under multiple use and sustained yield principles. The mission of the Forest Service is to sustain the health, diversity, and productivity of America's forests and grasslands to meet the needs of present and future generations. The Forest Service oversees a vast and complex array of natural resources and land use opportunities.

One of the key opportunities provided on NFS lands is outdoor recreation. The most recent National Visitor Use Monitoring figures show that the national forests and grasslands receive almost 171 million visits each year. Visitors participate in a wide range of motorized and non-motorized recreational activities, including camping, hunting, fishing, hiking, horseback riding, bicycling, cross-country skiing, over-snow vehicle use, and operating off-highway vehicles (OHVs). Annually approximately 11 million visitors engage in OHV activities on NFS lands. Over-snow vehicle users and visitors driving on forest roads for pleasure add to this total.

Travel Management

Nationally, the Forest Service manages over 200,000 miles of NFS roads that are open to motor vehicle use. In addition, approximately 155,600 miles of trails are managed by the Forest Service, with an estimated 37 percent or 57,500 miles of those trails open to motor vehicle use, including over-snow vehicles.

This transportation system ranges from paved roads designed for passenger cars to single-track trails used by motorized dirt bikes. Many roads designed for high-clearance vehicles (such as logging trucks and sport utility vehicles) also accommodate use by all-terrain vehicles (ATVs) and other OHVs not normally found on city streets. Almost all NFS trails serve non-motorized uses, including hiking, bicycling, cross-country skiing and horseback riding, alone or in combination with motor vehicle uses. National Forest System roads accommodate non-motorized use as well.

National forests include public roads managed by state, county, and local governments. These roads serve the commercial and residential needs of local communities

and private lands intermingled with and near the lands we manage. Many county roads are cooperatively constructed and maintained through cooperative forest road agreements executed under the National Forest Roads and Trails Act. State and county roads also provide access to NFS lands, and we continue to work in cooperation with states and counties to manage our multi-jurisdictional transportation system.

In the 1960s, recreational motor vehicle use on NFS roads was relatively light compared with timber traffic. Today, recreational motor vehicle use constitutes 90 percent of all traffic on NFS roads. Much of the road system maintenance needs and resource damage concerns are the result of continuous recreational use of roads originally designed and constructed for controlled intermittent commercial use. We consider capability to maintain roads in decisions to designate roads for motor vehicle use.

The Travel Management Rule

In 2005, under Former Chief Dale Bosworth, the Forest Service recognized unmanaged recreation as one of the four major threats to the National Forests and Grasslands, and developed an approach to enhance management of motor vehicle use on NFS lands. The Forest Service is continuing to implement the 2005 Travel Management Rule. The travel management rule has three subparts: Subpart A—Administration of the Forest Transportation System; Subpart B—Designation of Roads, Trails, and Areas for Motor Vehicle Use; and Subpart C—Use by Over-Snow vehicles.

Unmanaged roads can create both safety and resource problems. Where roads are no longer adequately maintained, erosion and silting into channels is common. In national forests with a significant amount of motor vehicle use, some users have created their own roads. These user-created roads were never engineered properly, surveyed for potential impacts, or vetted for need. Under certain conditions, these roads may cause significant damage to the surrounding ecosystem, for example, by channeling concentrated water flows that scour the forest floor and deposit soils in watercourses. Additionally, since these roads were never engineered, they may pose hazardous conditions that can pose safety threats, such as poor sight distance for motorists, hikers, or bikers navigating around a blind corner. The travel management rule is a crucial step to address these concerns.

SUBPART A

Subpart A of the travel management rule requires each administrative unit of the NFS to identify the minimum road system needed for safe and efficient travel and for the protection, management, and use of NFS lands. Identification of the minimum road system includes identification of roads that are no longer needed to meet forest resource management objectives and that may be decommissioned or considered for other uses.

Identifying the minimum road system involves an interdisciplinary and science-based travel analysis that is intended to identify opportunities to increase or decrease the road system, as appropriate, based on the unique ecological, economic, and social conditions in each national forest or grassland. NFS roads of all maintenance levels must be included in the travel analysis. Regional Foresters must certify for completion the travel analysis reports for the administrative units under their jurisdiction.

Subpart A is designed to work in conjunction with other frameworks and processes, the results of which collectively inform future decisions. These other frameworks and procedures include the Watershed Condition Framework, the Framework for Sustainable Recreation, and forest-wide planning under the National Forest Management Act.

Most administrative units have completed travel analysis or the equivalent for passenger car roads. A small percentage of administrative units have completed travel analysis for roads designed for high-clearance vehicles and for roads used only intermittently.

SUBPART B

Subpart B of the Travel Management Rule requires Forest Supervisors or other responsible officials to designate those roads, trails, and areas where motor vehicle use is allowed in their administrative units or ranger districts and to identify them on a motor vehicle use map (MVUM). Once an MVUM is published for a unit or district, use in that unit or district that is inconsistent with those designations is prohibited. By the end of fiscal year 2011, 77 percent of administrative units had designated roads, trails, and areas that are open to motor vehicle use, and have published a motor vehicle use map. The remaining units are actively engaged in completing their motor vehicle use map.

The Travel Management Rule provides a nationally consistent framework for local decision-making regarding motor vehicle use on NFS lands. Decisions are made by local agency officials, who have greater knowledge of the affected resources. Local decision-making also allows for more effective participation by the public; local, county, state, and other federal agencies; and Tribal governments. Under the travel management rule the public must be given the opportunity to participate in the designation process, thereby resulting in better decisions and local support for them.

Implementation of Travel Management Decisions under Subpart B

Although completing the route and area designation process and publishing MVUMs under Subpart B represents a tremendous amount of work for the Forest Service and the public, these steps constitute only the beginning of the process to actively manage motor vehicle use and to provide sustainable motor vehicle recreational opportunities.

Forest Service public outreach efforts inform people how to minimize their impacts with motor vehicles while enjoying the national forests. Messages include staying on designated routes, being courteous to other users, and being knowledgeable of agency regulations. Education generally is provided by Forest Service employees, routinely supplemented by the many volunteers and other partners. The Forest Service's capability to inform and educate the public about where and how they may operate motor vehicles is greatly enhanced by the many hours of time provided by volunteers and partners.

Education works both ways. Many members of the public have extensive historical and practical knowledge of the landscape. Involving them in the process and learning from them are essential elements of the dialogue.

Several national organizations assist the Forest Service with disseminating educational messages about responsible recreational use. The National Off-Highway Vehicle Conservation Council (NOHVCC) consists of enthusiasts who promote responsible riding in many ways. The American Motorcyclist Association partnered with the Motorcycle Industry Council to produce a brochure on responsible riding. Tread Lightly! is a non-profit organization whose mission is to protect recreational access and opportunities through education and resource stewardship. Tread Lightly! works with the Forest Service and other land management agencies, manufacturers, industry, and motorized vehicle recreation organizations to promote resource protection.

Although signs are no longer the primary tool for enforcement of motor vehicle restrictions on NFS lands, signs remain a critical part of OHV management in the NFS. Signs and route markers are installed, as appropriate, to help the public understand where they may operate motor vehicles on NFS roads, on NFS trails, and in areas on NFS lands.

The Forest Service will monitor designated routes and areas for effects on natural and cultural resources, public safety, and conflicts among uses, as well as consider input on the need for additional opportunities for motor vehicle use. Monitoring may also focus on the level of compliance and route conditions. Revisions to designations may be made based on the results of monitoring.

SUBPART C

Subpart C provides for regulation of over-snow vehicles. Designation of routes and areas for over-snow vehicles is discretionary. Some Forests are moving ahead with this analysis, which will help provide quality recreational experience, while minimizing conflicts.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions you or other members of the Subcommittee may have.

Mr. BISHOP. Thank you, Chief Tidwell. I appreciate you being here.

Before our next witness speaks, I understand that her congressman is here, Representative Labrador. If you would be willing——

Mr. LABRADOR. Thank you, Mr. Chairman.

Mr. BISHOP.—to introduce her, I would appreciate it.

Mr. LABRADOR. Thank you. Good morning. Chairman Bishop and Ranking Member Grijalva, thank you for convening this important hearing today. I would just like to welcome Margaret Soulen-Hinson, who is a public lands rancher and the president of the American Sheep Industry, for testifying at this hearing.

Margaret provides unique perspective and will serve as a huge asset to this panel today. For generations, her family has grazed sheep on public lands. She will provide a wealth of information on the planning rule, and I would like to welcome her today.

Today's topics are a high priority to me and to my district. Public lands are a vital component of my district, and I have made it a high priority to ensure that the multiple uses of our Federal lands are protected. I fear that certain uses are in jeopardy under the proposed forest planning rule.

This Administration continues to strap the American people with additional burdensome regulations that will hinder our economic growth. This planning rule in my opinion is another example of this.

I look forward to listening to the input of Ms. Hinson and our distinguished panel today. Thank you.

Mr. BISHOP. Thank you.

STATEMENT OF MARGARET SOULEN-HINSON, PRESIDENT, AMERICAN SHEEP INDUSTRY ASSOCIATION, PUBLIC LANDS COUNCIL

Ms. SOULEN-HINSON. Well, Congressman Bishop and Ranking Member Grijalva and Members of the Subcommittee, thank you for inviting me to testify today.

As Congressman Labrador said, I am Margaret Soulen-Hinson, and I am here to speak on behalf of the Public Lands Council, who represents public lands ranchers across the West, about 22,000 of them. I also am here as a cattle and sheep producer myself and as president of the American Sheep Industry Association, who represents over 80,000 producers.

My family has a range sheep and cattle operation in Idaho, spanning across eight counties. We run 8,000 head of sheep on the Payette National Forest where we have a long history, three generations, of cooperation with the Forest Service. Our operation is comprised of a mix of our private lands, BLM, state grazing leases, private land leases and our forest permit on the Payette National Forest.

It is the makeup of all of these pieces that creates a sustainable, year-round operation. As we move our sheep across the landscape, we depend upon our Peruvian herders, who come to this country to work so that they may provide for an education for their children. Our foreman, Caesar A. Young, began working for us when he was 17 years old. He has been with us for almost 30 years and became a U.S. citizen 10 years ago. His daughter serves in the U.S. Air Force. I mention this because these are the people who are the essence of our operation.

By 2013, we will be forced to remove 60 percent of our sheep from our allotments on the Payette, which may well mark the end of our family's 80-year-old sheep operation. This is due to a very specific wildlife provision of the current planning rule which calls for management of species viability in forest planning areas. The term viability is a vague, ill-defined term which appears nowhere in statute. It has been the source of endless litigation and economic loss over the years.

Because of the perception that interaction between domestic and big horn sheep in open range conditions may result in the transfer of disease to big horns, enemies of grazing have been able on grounds of viability to force the decision to remove 70 percent of domestic sheep from the Payette. Should a decision such as the one on the Payette be implemented West-wide, we would see a drastic reduction, even failure, of many American sheep operations.

An estimated 23 percent of the entire domestic sheep industry would be impacted, in turn destroying industry infrastructure and threatening thousands of American jobs. Nevermind that domestic sheep graze on less than 5 percent big horn habitat or that promising vaccine research is underway as we speak. Viability is a fleeting thing.

And if the draft rule is implemented, big horns are just the tip of the iceberg. While the Administration has assured us that the viability component is better in the draft rule because it applies only to populations of species of conservation concern, they are omitting four important facts.

First, there exists no scientifically based definition of what qualifies a species of conservation concern. According to the draft rule, the responsible official may designate them at will, making the list of species to manage for viability limitless.

Second, the draft rule would apply viability not just to vertebrates, as in the current rule, but to all types of species from fungus to slugs to moss. It will be impossible to establish accurate population surveys for these thousands of species. The result will be more litigation.

Third, the draft rules call for the best scientific information and throws away the Lands Council decision that judges must defer to the Forest Service as to what evidence is or is not necessary to support wildlife viability analysis. The burden of proof would lay with the Forest Service to show that they used the best science, a litigation landmine.

Finally, while we may argue details, perhaps the most important note is that viability is not within the statutory authority of the Forest Service. Statute requires management for multiple use and says nothing about species viability. We recommend the Forest Service remove entirely the term viability and leave wildlife management to the states as required by statute. The agency should focus not on individual species viability but on providing for habitat.

In closing, the preamble of the proposed rule says that social, environmental and economic considerations cannot be ranked in order of importance, implying that they should be considered equally. I wish the actual proposed rule reflected that spirit. For generations, ranchers have depended on and nurtured the same resources our wildlife depend upon. Entire communities across the West and a sizable portion of our national economy hinge on the continued multiple use of our national forests.

Let us come up with a better rule, one to replace the 29-year-old outmoded rule of 1982, but let us not replace hard-working ranching families with regulations that are impossible to implement. Thank you, and I would be happy to answer any questions the Committee may have later.

[The prepared statement of Ms. Hinson follows:]

Statement of Margaret Soulen Hinson, Public Land Rancher and ASI President, Public Lands Council & American Sheep Industry Association

Dear Chairman Bishop, Ranking Member Grijalva and Members of the Subcommittee:

The Public Lands Council (PLC) and American Sheep Industry Association (ASI) appreciate the opportunity to voice to the Subcommittee on National Parks, Forests and Public Lands our concerns regarding the United States Forest Service's proposed forest planning rule (*see* 76 Fed. Reg. at 8480 (Feb. 14, 2011)). To date, we have provided written comments to the Forest Service and participated in multiple public hearings so as to provide insights as to the impacts the proposed rule is likely to have on public lands grazing. Despite our concerns and calls from Congress to revise the proposed rule, indications from the administration are that they are committed to moving forward with a largely unchanged final rulemaking, some time within the next two months. This is a major rulemaking that, by the agency's own projection, will cost more than $100 million per year to implement, and will impose far-reaching regulatory burdens on businesses and rural communities. Such a rulemaking should not be made in haste, but rather given the oversight and deliberation of congressional review.

On February 14, 2011, the United States Forest Service published a notice of proposed rulemaking and request for comment in the Federal Register. *See* 76 Fed. Reg. at 8480 (Feb. 14, 2011). The Forest Service is proposing a new planning rule ("Proposed Rule") to guide land and resource management planning for all units of the National Forest System ("NFS") under the National Forest Management Act ("NFMA"). *Id.* at 8480. Along with the Proposed Rule, the Forest Service released a draft programmatic environmental impact statement ("DPEIS") to analyze the effects of the Proposed Rule and other alternatives under the National Environmental Policy Act ("NEPA"). *See* Draft Programmatic Environmental Impact Statement, National Forest System Land Management Planning (Feb. 2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5274118.pdf. PLC and ASI's comments are in regard to the Proposed Rule as well as the DPEIS. Please include this statement in the congressional record.

PLC and ASI have thousands of members who are public land ranchers and who are involved in managing natural resources throughout the West every day. Public land ranchers own over 100 million acres of the most productive private land in the West and manage vast areas of public land, accounting for critical wildlife habitat and a significant portion of the nation's natural resources. PLC and ASI work to maintain a stable business environment in which livestock producers can conserve the resources of the West while producing food and fiber for the nation and the world.

The proposed rule is not consistent with the "Improving Regulation and Regulatory Review" Executive Order issued on January 18, 2011 by President Obama, as well as previously existing requirements for cost-effective, less burdensome, and flexible regulations, such as the Regulatory Flexibility Act. The January 18, 2011 Executive Order requires that regulations be tailored to "impose the least burden on society, consistent with regulatory objectives" and that agencies are to review and change or eliminate rules that may be "outmoded, ineffective, insufficient, or excessively burdensome." Yet the Forest Service's own analysis of the proposed rule confirms that even under favorable assumptions, it will be only slightly less costly than the 1982 Planning Rule that has been identified as outmoded and overly burdensome—i.e. approximately $1.5 million less per year than the $104 million annual cost of the 1982 Rule. DPEIS at 43.

The DPEIS and accompanying analysis for the proposed rule confirm that there are readily available alternatives that are far less costly and burdensome, alternatives which still meet NFMA requirements and the agency's stated purpose and need for a new Planning Rule.

For example, Alternative C in the DPEIS would, according to the Forest Service analysis, cost nearly $24 million (24%) less to implement per year than the proposed rule. DPEIS at 43. As another example, the 2008 Planning Rule contains most of the same basic concepts as the proposed rule but is only half the length of the proposed rule (7 pages of Federal Register text compared to 14 pages for the proposed rule). The 2008 Rule has its flaws, but was enjoined by a federal district court only for procedural shortcomings in the EIS and Endangered Species Act Section 7 consultation completed for the rulemaking, and not for any inadequacy in meeting NFMA requirements. *Citizens for Better Forestry v. U.S. Dept. of Agriculture,* 632 F.Supp.2d 968 (N.D. Cal. 2009).

The overly detailed, burdensome rhetoric and mandates in the proposed rule can be eliminated without any loss of useful, nationwide programmatic guidance for national forest land management planning. Detail regarding basic concepts and requirements in the Planning Rule can and should be, instead, included in the Forest Service Manual and Handbook directive system ("FSM/FSH"), where it can guide and facilitate national forest planning rather than burden the agency, national forest users, dependent communities, and taxpayers with unnecessary detailed, restrictive, and confusing regulatory mandates.

It is more consistent with the adaptive management approach incorporated in the proposed rule to include such details in the directive system, where content can more easily be clarified, refined and updated than when promulgated as a formal rule in the Code of Federal Regulations. The difficulty of updating overly burdensome published regulations is confirmed by the persistence of the 1982 Rule for nearly thirty years, despite several past attempts to replace it.

As an example of material that belongs in the FSM/FSH, most if not all of the content in the "sustainability" and "diversity of plant and animal communities" sections of the proposed rule is already included in substantially similar form in FSM ID No. 2020–2010–1, Ecological Restoration and Resilience, and FSH 1909.12–2000–5, Chapter 40—Science and Sustainability.

Section 219.1(d) of the proposed rule already requires the Forest Service to establish procedures for Planning Rules in the FSM/FSH. Much of the detailed content in the proposed rule, with appropriate modifications to simplify and conform it to NFMA and Multiple Use Sustained Yield Act ("MUSYA") principles, can be moved to the FSM/FSH with ease.

The complexity of the rule and how it will increase confusion and cost is illustrated by its treatment of wildlife. The planning rule and its preamble include multiple categories of species: indicator, focal, keystone, ecological engineers, umbrella, link, species of concern, threatened, endangered, and "others." Some of the species are probably mutually exclusive but other species overlap, creating a planning nightmare. The forest planning rule should be focused on habitat, a factor over which it has some control.

The Proposed Rule Ignores the Appropriate Role of Multiple-Use:

Though occasionally referenced in the proposal, the Forest Service appears to be ignoring its multiple use mandate, a mandate imposed by Congress, codified in agency regulations and affirmed by the courts. This problem manifests itself in three ways. First, the proposal fails generally to acknowledge the multiple use mandate as a guiding principle of forest planning. Second, proposed provisions specifically conflict with the multiple use mandate. Third, the proposed definition of "ecosystem services" is so inclusive and vague that it dilutes the entire concept of multiple use.

Congress established the NFS through the Organic Administration Act of 1897, 30 Stat. 11 (June 4, 1987). By operation of the Transfer Act of 1905, 33 Stat. 628 (Feb. 1, 1905), stewardship of the national forests was transferred from the Department of the Interior to the Department of Agriculture. Over the next decades, Congress consistently and clearly specified through a number of enactments that stewardship over the national forests would be guided by the principles of multiple use and sustained yield. These statutes, all of which endorse multiple use and sustained yield, include the MUSYA, 16 U.S.C. §§ 528–31; the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600–14; and NFMA, 16 U.S.C. § 1600 *et seq.*

> "Multiple use" is defined in Section 4 of the MUSYA as: the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. § 531

The multiple use sustained yield statutory mandate is a viable and credible planning blueprint for managing forest lands. Although the Forest Service is required to ensure that multiple use remains on par with sustainability concepts, the overview of the proposed rule clearly prioritizes other areas of consideration that the

rule must address, including climate change, forest restoration and conservation, wildlife conservation, and watershed protection, before so much as mentioning the need for the rule to meet the statutory requirements of the NFMA, MUSYA and other legal requirements. Additionally, the sustainability section expressly states that "sustainability is the fundamental principle that will guide land management planning." *See* 76 Fed. Reg. at 8490. Such statements clearly reflect a lack of acknowledgement on the part of the Forest Service of the important function multiple use must play in the land planning process.

As appropriately concluded by the U.S. Court of Appeals for the Seventh Circuit, the Forest Service does not have the discretion to ignore the multiple use mandate to focus solely on environmental and recreational resources. The court specifically held that "the national forests, unlike national parks, are not wholly dedicated to recreational and environmental values." *Cronin v. United States Department of Agriculture,* 919 F.2d 439, 444 (7th Cir. 1990). The Forest Service, through the planning rule, must actively promote this stewardship role delegated to it by Congress in legislation spanning more than a century and consistently upheld by the courts. The proposal fails to adequately do so.

The Proposed Rule Goes Beyond Statutory Authority with "Viability" of Species:

The Forest Service's Proposed Rule does not comply with NFMA and MUSYA, which provide the agency's land management planning authority. Neither of these statutes require the Forest Service to manage for species "viability" through land management planning. Rather, the Forest Service is tasked with providing for "diversity of plant and animal communities," along with providing for other multiple use objectives. And, the statutes are clear that providing for diversity does not take precedence over providing for other forest resources, such as range resources.

Managing for "diversity of plant and animal communities" under NFMA means managing for habitat diversity and does not include a requirement to maintain "viable" populations of "species of conservation concern" or otherwise maintain and restore species' populations. Various state wildlife agencies have constitutional and statutory duties to protect the viability of species and manage species' populations. NFMA's diversity requirement is limited to protecting habitat and can be met by establishing a plan that provides appropriate ecological conditions for plant and animal communities. That should be the focus of the Forest Service's Proposed Rule.

PLC and ASI are concerned that the Forest Service's divergence from its authority under NFMA and the MUSYA will elevate the objective to provide for diversity of plant and animal communities above other objectives, particularly the objective to provide for range resources. Without revision, the Proposed Rule could limit grazing on public lands which would adversely affect the operations of our members and result in decay of both private and public lands managed by those members. As a result, PLC and ASI have recommended that the Forest Service revise the Proposed Rule to address the issues presented in these comments.

The Proposed Rule Must Comply with NFMA and the MUSYA:

The Forest Service's new planning rule must meet requirements under NFMA, 16 U.S.C. §§ 1600–1614, as well as allow the agency to meet its obligations under the MUSYA, 16 U.S.C. §§ 528–531. NFMA provides that "[i]n developing, maintaining, and revising plans for units of the National Forest System. . .the Secretary shall assure that such plans—(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the [MUSYA], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish and wilderness. . .." 16 U.S.C. § 1604(e). The MUSYA provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. In other words, the NFS is to be administered for "multiple use," which includes administration of range resources, along with administration of wildlife. *See id.* § 1604(e)(1); *id.* § 528; *id.* § 531(a) (defining "multiple use"). Wildlife has never been and should not become the Forest Service's only consideration when developing land management plans for NFS lands.

NFMA also provides that Forest Service planning regulations shall include guidelines for land management plans which:

> (A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish; [and]

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives. . ..

Id. § 1604(g)(3)(A)-(B).

Along with consideration of economic aspects of management, the Forest Service must provide for diversity of plant and animal communities to the extent a specific land area is suitable for and capable of such multiple use objective. *Id.*

Although NFMA and MUSYA require consideration of *multiple* use objectives, including consideration of range resources, the Proposed Rule is focused largely on maintenance and restoration of wildlife. *See* 76 Fed. Reg. at 8518–19 (§§ 219.8–219.10). This focus ignores the Forest Service's multiple use mandate. Administration of the NFS for range resources is not simply to be *considered* when administering the system for wildlife, *see id.* at 8519 (§ 219.10). Rather, administration of the System for range resources is an equally important purpose that the Forest Service must consider on equal footing with, not simply in addition to, wildlife. *See* 16 U.S.C. § 528. The Forest Service must insure that its management of the NFS provides for range resources. *Id.* § 1604(g)(3)(A).

The Proposed Rule provides an entire section (§ 219.9) to implement NFMA Section 1604(g)(3)(B) concerning wildlife, but ignores NFMA Section 1604(g)(3)(A) concerning other forest resources. To properly implement Section 1604(g)(3)(A), the Forest Service must give equal treatment to other forest resources in the Proposed Rule. *See* 76 Fed. Reg. at 8519 (mentioning consideration of other forest resources in § 219.10). Accordingly, the Forest Service should revise the Proposed Rule to adequately consider and provide for all of the Forest Service's multiple use objectives, including the consideration and provision of range resources.

The "Viable Population" Requirement Should Not Be Included as Part of the Proposed Rule:

Neither NFMA nor MUSYA require the Forest Service to manage for wildlife "viability" when developing plans for the NFS. Certainly, there is no statutory requirement for the Forest Service to "maintain" species viability, or manage for species viability to the detriment of other multiple use objectives.

Although NFMA and the MUSYA do not require the Forest Service to manage for species viability, the Proposed Rule provides that land management plans "must provide for the maintenance or restoration of ecological conditions in the plan area to. . .[m]aintain viable populations of species of conservation concern within the plan area." *See* 76 Fed. Reg. at 8518 (§ 219.9(b)(3)). Further, the Proposed Rule states: "[w]here it is beyond the authority of the Forest Service or the inherent capability of the plan area to do so, the plan components must provide for the maintenance or restoration of ecological conditions to contribute to the extent practicable to maintaining a viable population of a species within its range." *Id.*

Because maintenance of "viable populations of species" is not a requirement under NFMA or MUSYA, the Forest Service is exceeding its authority under those statutes by making it a requirement under the Proposed Rule. Likewise, the Forest Service is exceeding its authority under those statutes by requiring "restoration" of ecological conditions for species viability. To be consistent with its authority under NFMA and MUSYA, the Proposed Rule should be revised to eliminate the concept of species viability as a management requirement.

Besides lacking statutory authority, the concept of species viability is itself impermissibly vague. Scientists often disagree on when, and on what level, a population is considered "viable." There is additional disagreement on how species viability is to be "maintained" or "restored." How can the Forest Service measure and prove that it is "maintaining" or "restoring" species viability? Although the Proposed Rule defines the term "viable population," the definition provides little in the way of hard-and-fast standards to measure species viability. *Id.* at 8525 (§ 219.19). Laws must provide explicit standards to the regulated community for the community to know what is prohibited, so that it may act accordingly, and to prevent arbitrary and discriminatory enforcement. *See Grayned v. Rockford,* 408 U.S. 104, 108 (1972); *Roberts v. United States Jaycees,* 468 U.S. 609, 629 (1984). The Forest Service's regulations on species viability in the Proposed Rule fail to meet these standards.

Use of the concept of species viability is likely to subject the Forest Service to litigation over the agency's authority to utilize the concept and over the meanings of "viability," "maintenance" and "restoration." These issues have been the source of considerable litigation in the past. *See, for example, Lands Council v. Cottrell,* 731 F. Supp. 2d 1028 (D. Idaho 2010); *Oregon Natural Resources Council Fund v. Goodman,* 382 F. Supp. 2d 1201 (D. Or. 2004), *affirmed* 110 Fed. Appx. 31; *Utah Environmental Congress v. Bosworth,* 370 F. Supp. 2d 1157 (D. Utah 2005), *affirmed* 443

F.3d 732; *The Lands Council v. McNair,* 537 F.3d 981 (9th Cir. 2008), *rehearing en banc denied.*

In order to act within its authority under NFMA and MUSYA and avoid potential litigation, the Forest Service should remove the "viable population" requirement from the Proposed Rule. Measuring species' populations is not required by NFMA or MUSYA and should not be the focus of the Proposed Rule. Establishing means to accurately inventory thousands of species populations is an untenable proposition. The Forest Service should leave wildlife management to the various state wildlife agencies that have constitutional and statutory duties to manage species' populations and protect the viability of species. The Proposed Rule should concentrate on providing for habitat diversity, which would better meet NFMA's requirement to "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B). And, the Proposed Rule should focus on providing habitat diversity as one component of the Forest Service's multiple use management approach, not the only component.

The Proposed Rule Should Better Define "Species of Conservation Concern":

The Proposed Rule's "viable population" requirement applies to "species of conservation concern." *See* 76 Fed. Reg. at 8518 (§ 219.9(b)(3)). "Species of conservation concern" are defined as "[s]pecies other than federally listed threatened or endangered species or candidate species, for which the responsible official has determined that there is evidence demonstrating significant concern about its capability to persist over the long-term in the plan area." *Id.* at 8525 (§ 219.19).

By eliminating the "viable population" requirement from the Proposed Rule, the definition of "species of conservation concern" may be unnecessary. However, if the definition remains part of the Proposed Rule, it should be revised. This definition does not provide a science-based standard for determining species of conservation concern. Instead, the definition relies solely on the opinion of the responsible official to determine which species should be designated as a species of conservation concern. As it stands, the definition is likely to lead to arbitrary and capricious decision-making.

The definition of "species of conservation concern" should be revised to provide science-based evidentiary standards for determining when a species is a "species of conservation concern." The definition should indicate what "evidence" is required for such determination and define what is meant by "significant concern." The "evidence" and "significant concern" should be based on credible scientific information available to the Forest Service and not simply on the opinion on the responsible official.

Further, the need and authority for the Forest Service to designate species of conservation concern should be adequately discussed if the Forest Service decides to retain the designation in its planning rule. Additionally, the Forest Service should explain in the rule whether or not the designation applies to all species of wildlife and plants, or a more limited subset of species, such as vertebrate species. The DPEIS suggests that the designation applies to all species of wildlife and plants. *See* DPEIS at 109 ("the focus for maintaining viable populations is extended to all native plant and animal species, not just vertebrate species"). Expanding the designation to encompass all species of wildlife and plants would apply the regulation to species that may not have been previously covered. This would likely increase litigation, since instead of applying to vertebrate species like the current planning rule, plan requirements would apply to a host of additional species, including invertebrates such as fungi, slugs, and insects. The Proposed Rule should be revised to discuss the authority for such expansion and the DPEIS should analyze the effects of the additional protections, including effects on other forest resources and Forest Service staffing and budgets.

Finally, the DPEIS suggests that the viability requirement would be extended to "at-risk species" on national forests and grasslands. DPEIS at 110 (plans would "include additional species-specific plan components needed to maintain viability of at-risk species on national forests and grasslands"). This extension of the viability requirement is not mentioned in the Proposed Rule, but should be if the Forest Service intends for it to be part of the rule. As with "species of conservation concern," the Forest Service should discuss its authority for extending protections to "at-risk species," define the term in the rule and analyze the effects of the additional protections in the DPEIS. Because "at-risk species" are not discussed in the Proposed Rule or adequately analyzed in the DPEIS, the Forest Service should either entirely eliminate the term and associated protections from the rule and DPEIS or revise the rule and DPEIS to discuss the term, how "at-risk" would be objectively determined, and associated protections.

Requiring the Use of the "Best Available Scientific Information" Will Make Decision-making Time Consuming and Vulnerable to Litigation:

Sound science has an important role in Forest Service planning and management. However, decisions should be made based on agency expertise and available, relevant science, rather than on the "best available science" as referenced in § 219.3. Which science is "best," as illustrated in ESA litigation as well as NFMA and other disputes, can be extremely subjective and highly politicized.

NFMA does not use or require use of the term "best available science" or "best available scientific information." Neither does NEPA. The Ninth Circuit Court of Appeals has affirmed that these statutes do not require a determination of whether national forest planning or project-level NEPA documents are based on "best" available science or methodology; that disagreements among scientists are routine; and that requiring the Forest Service to resolve or present every such disagreement could impose an unworkable burden that would prevent the needed or beneficial management. *Lands Council v. McNair,* 537 F.3d 981, 991 (9th Cir. 2008)(en banc); *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1359 (9th Cir. 1994).

The Proposed Rule's procedures will create new legal claims centered on the requirement that the Forest Service consider the "best available science" and demonstrate that the "most accurate, reliable, and relevant information" was considered and how it "informed" the development of the forest plan (§ 219.3). In *Lands Council*, a unanimous en banc panel of the Ninth Circuit gave the Forest Service more leeway and flexibility regarding scientific analysis. The Court emphasized that, "[t]o require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose." *McNair*, 537 F.3d at 1001.

Second, the Proposed Rule is written in a way that puts the burden on the Forest Service to prove that it identified the best science, "appropriately" interpreted it, and explain how it informed the decision (§ 219.3). This places the burden of proof on the agency, whereas we believe that the burden to prove that the Forest Service was arbitrary and capricious in its decision-making should remain with plaintiff.

Third, the science-dominated Proposed Rule undermines the principle, supported by case law, that the agency can make natural resource management decisions based on its discretion in weighing various multiple use objectives. In *Seattle Audubon Society v. Moseley,* 830 F.3d 1401, 1404 (9th Cir. 1996), the court upheld selection of an alternative in the Northwest Forest Plan that provided an 80% rather than 100% probability of maintaining the viability of the spotted owl because "the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA." The Ninth Circuit in the *Mission Brush* case finally recognized that "[c]ongress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress' early regulation of the national forests, it has never been the case that 'the national forests were. . .to be set aside for non-use'." *McNair,* 537 F.3d at 990.

Fourth, sound national forest planning and management that complies with NFMA, the MUSYA, and other applicable laws must reflect more than "western" or European culture academic science and scientist opinion. Native American and other traditional local knowledge, along with other practical expertise, collaborative consensus reached through the planning process regarding application of science, and other considerations are critical to environmentally, economically, and socially sound forest planning and plan implementation.

Thus, the Proposed Rule must not require the Forest Service to do more than take into account available, relevant scientific information along with other factors in the development, amendment, or revision of national forest plans, without reference to which information is "best" (§ 219.3). § 219.3 should be deleted or greatly abbreviated and corrected accordingly, along with any other references to "best available scientific information" in the Proposed Rule.

The use and dissemination of scientific information by federal agencies is addressed by the Federal Data Quality Act (44 U.S.C. § 3516) and subsequent guidelines from the Office of Management and Budget (http://www.whitehouse.gov/omb/fedreg_reproducible). We believe the protections and assurances provided by the Federal Data Quality Act are sufficient to ensure the quality of the data used and distributed by the Forest Service in the planning process. A requirement to identify the "most accurate" or "best available" scientific information should not be a legal requirement in the planning rule itself.

The Proposed Rule Makes Overly Broad Requirements for Riparian Area Protection:

PLC and ASI find infeasible the provision that requires that each plan "must include components to maintain, protect, or restore riparian areas." (§ 219.8(a)(3)). Every plan "must establish a default width"—in other words, an arbitrary buffer zone—around "all lakes, perennial or intermittent streams, and open water wetlands." (§ 219.8(a)(3)). The example given in the preamble of the draft rule calls for a buffer zone of 300 feet on each side of a perennial stream. Limitations such as this have the strong potential not only to greatly reduce livestock forage and watering access, it also threatens our members' adjudicated water rights.

The Proposed Rule Wrongly Elevates Ecological Sustainability over Social and Economic Concerns:

In the explanation of the Proposed Rule, the Forest Service states that "[t]he proposed rule considered the ecological, social, and economic systems as interdependent systems, which cannot be ranked in order of importance." *See* 76 Fed. Reg. at 8491. However, in the same section of the Proposed Rule explanation, the Forest Service goes on to state that "the agency has more influence over the factors that impact ecological sustainability on NFS lands (ecological diversity, forest health, road system management, etc.) than it does over factors that impact social and economic sustainability (employment, income, community well-being, culture, etc.)." *Id.*

The Proposed Rule goes on in § 219.8 to give disparate treatment to environmental systems versus social and economic systems. It requires forest plan components to "*maintain or restore* the structure, function, composition, and connectivity of healthy and resilient terrestrial and aquatic ecosystems and watersheds in the plan area. . .." (emphasis added) while requiring only that the plan include components "*to guide the unit's contribution* to social and economic sustainability. . .." (emphasis added) (§ 219.8(a),(b)). We support the initial assertion of the agency that social, environmental and economic considerations are not competing values, and believe that, by practicing active forest management, the Forest Service is in a position to have a substantial impact on all elements of sustainability—ecological, social and economic. We request that the Proposed Rule recognize this influence.

The Proposed Rule Inappropriately Gives "Protection" Status to Recommended Wilderness:

Only Congress can create Wilderness (16 U.S.C §§ 1131–1136, *Id.* § 1132(b)). The Forest Service should not create *de facto* wilderness by requiring, as would the Proposed Rule, that any area "recommended for wilderness" be "protected" (§ 219.10 (b)(iv)).

Nothing in the Proposed Rule Explicitly States that the Forest Service May Continue to Operate under Existing Plans until the New Plans Are Completed and Survive Any Legal Challenges:

NFMA explicitly provides that "[u]ntil such time as a unit of the National Forest System is managed under plans developed in accordance with this Act, the management of such unit may continue under existing land and resource management plans." 16 U.S.C. 1604(c). To avoid disruption of existing contracts, account for the inevitable legal challenges, and to be consistent with NFMA, the Proposed Rule should provide that the Forest Service operate under existing plans until all challenges to the new plans are resolved.

The New Requirement that the Plan Provide Opportunities for "Spiritual Sustenance" Is Unattainable and outside AgencyAuthority:

In the Proposed Rule, "ecosystem services" are defined to include "[c]ultural services such as. . .spiritual. . .opportunities." *See* 76 Fed. Reg. at 8523 § 219.19. "Plans will guide management of NFS lands so that they. . .provide. . .opportunities. . .for. . .spiritual. . .sustenance." *See* 76 Fed. Reg. at 8514 § 219.1(c). The plan "must provide for multiple uses, including ecosystem services." *See* 76 Fed. Reg. at 8519 § 219.10. The First Amendment of the Constitution prohibits the making of any law "respecting an establishment of religion" and the Forest Service should not delve into the arena of how Forest Plan decisions comport with spiritual sustenance.

A Pre-decisional Objection Process Is a Superior Approach for Challenge to a Forest Plan to the Administrative Appeals Process:

§ 219.52 of the Proposed Rule appropriately calls for objections to a draft plan to be made before the final plan is released. This requirement would allow the agency to take issues into account and make appropriate changes so as to avoid litigation. Under the current appeals system, those who just want to stop a project are not

required to participate in pre-decisional planning, and may simply sue once a final decision is made.

Conclusion

PLC and ASI appreciate the Forest Service's need to balance multiple uses of NFS lands; however, we are concerned that the Forest Service is elevating the objective to provide for diversity of plant and animal communities above other multiple use objectives, particularly, the objective to provide for range resources. PLC and ASI are also concerned with the Forest Service's focus on maintaining species viability, rather than providing for habitat diversity as is required by NFMA.

We would also like to express concern regarding *The Science Review of the United States Forest Service Draft Environmental Impact Statement for National Forest System Land Management,* which the Forest Service posted to the Planning Rule Website on April 27th. This information was provided more than two-thirds of the way through the comment period and thus we did not have adequate time to review and analyze the report. It is unclear how the panel was selected and to what extent the information provided in the report will be used to shape the final planning rule. We are concerned that the panel was not convened in a manner compliant with the Federal Advisory Committee Act (FACA), 5 U.S.C. §§ 1–16.

In similar comments submitted to the Forest Service on their Proposed Rule and DEIS, we have requested that they revise the Proposed Rule to be consistent with its authority under NFMA and MUSYA and to appropriately consider its multiple use objective to provide for range resources. Providing for range resources is an important objective of the Forest Service's multiple use and sustained yield mandate and is necessary to sustain the yields (food and fiber) from sheep and cattle grazing on NFS lands. The secondary beneficiaries of the Forest Service's compliance with its statutory mandates are the many rural economies in the West. Lastly, PLC and ASI submit that the Forest Service's ability to provide range resources and to manage for sustainable and healthy forest lands is integral to successful operations of our members.

Again, we thank you for the opportunity to provide these comments to the Subcommittee. If you have any questions concerning these comments or need further information, you may contact Dustin Van Liew at the Public Lands Council as our point of contact.

Mr. BISHOP. Thank you.

Mr. Horngren, you are recognized.

STATEMENT OF SCOTT HORNGREN, AMERICAN FOREST RESOURCE COUNCIL, FEDERAL FOREST RESOURCE COALITION

Mr. HORNGREN. Good morning.

Mr. BISHOP. Mr. Horngren, can I ask you to put that mic up to your mouth so we can hear you?

Mr. HORNGREN. How about if I turn it on?

Mr. BISHOP. OK. How about both of them?

Mr. HORNGREN. All right.

Mr. BISHOP. Pull it closer to you and turn it on.

Mr. HORNGREN. Yes. All right. Here we go. Good morning, Mr. Chairman and Members of the Committee.

Speaking as a former law firm attorney who used to bill by the hour, my prior law firm is thrilled by the proposed planning rule because litigation will explode over vaguely defined terms and how to comply with a multitude of new requirements.

Now I no longer bill by the hour, and I am a staff attorney for the American Forest Resource Council and am representing the Federal Forest Resource Coalition as well here today. Their member mills depend in part on timber sold from national forests. Their members also own adjoining lands to national forests where the Forest Service needs to reduce insect, disease and wildfire threats on these adjoining lands.

The proposed rule makes the Forest Service's resource management job harder and will increase the cost and complexity of preparing plans and the projects, leaving both more vulnerable to lawsuits. The one fundamental principle of success in real estate is location, location, location, and the one fundamental principle of a successful planning rule is discretion, discretion, discretion.

The courts say the Forest Service has it under the National Forest Management Act. It provides flexibility to get the forest health projects done promptly and at the least cost, and discretion is a shield against litigation because the courts increasingly defer to the Forest Service's exercise of this discretion.

But if you look at the planning rule, it is designed to eliminate discretion, which will increase the cost and complexity, hampering efforts to improve forest health. The word shall is used 55 times and must 98 times in the rule, creating a total of 153 obligations and possible legal claims.

First, the planning rule requires that all management direction adopted in a forest plan be in the form of mandatory standards instead of flexible guidelines. This is despite favorable court decisions that have upheld the Forest Service use of flexible guidelines. A 10 percent bank alteration grazing standard here, a mile and a half road density standard there, and pretty soon the Forest Service management discretion disappears.

Second, the planning rule requires assessments, which are broadly defined as any analysis related to "ecological, economic or social conditions, trends and sustainability within the context of the broader landscape." Huh? "For every such analysis, the Forest Service shall notify and encourage appropriate Federal agencies and scientists to participate in these assessments."

With the emphasis throughout the rule on global climate change, it is difficult to see how the EPA won't have to be involved in every facet of forest planning. And who are the so-called appropriate non-Federal scientists that must be involved? The answer will have to wait for years of lawsuits.

Last, rather than narrowing species viability requirements the rule expands them beyond vertebrate species like big game and birds to include all species on the planet like the slugs. And what is frustrating to us is the Act itself says that diversity from which this viability rule is derived is to provide the other multiple uses, not to be up on a pedestal itself, and the rule does not reflect the statutory command. The rule will essentially require expensive population surveys.

The health of the forest has deteriorated significantly under 30 years of the current viability rule, and the Forest Service should strive to narrow the viability rule and make it more workable. As an attorney, I am perplexed why the rule abandons legal victories that cemented the concept that the Forest Service decisionmakers can exercise their discretion.

Of greatest concern is that the rule will lead to ineffective stand treatments, increasingly limited by the requirement that all on-the-ground projects must comply with every so-called component, an ill-defined term in the rule used 40 times.

In closing, the National Forests are turning into dangerous, decrepit slums that threaten surrounding neighbors, and the plan-

ning rule will only further tie the hands of the people who are trying to solve the problem on the ground. The rule should make the job of improving forest health easier, less expensive and less time-consuming. Unfortunately, the rule does just the opposite.

Thank you for the opportunity to testify.

[The prepared statement of Mr. Horngren follows:]

Statement of Scott W. Horngren, Attorney, on Behalf of American Forest Resource Council and Federal Forest Resource Coalition

Chairman Bishop and members of the Subcommittee, thank you for the opportunity to testify. I am Scott Horngren, and I am testifying on behalf of the American Forest Resource Council (AFRC) and the Federal Forest Resource Coalition (FFRC).

AFRC is a nonprofit corporation and trade association headquartered in Portland, Oregon. AFRC represents lumber and plywood manufacturing companies throughout the west that obtain their raw material for their mills from private and federal forest lands. AFRC and its predecessor associations have actively participated through association staff and its members in the rulemaking, forest planning process, and forest plan implementation and monitoring on individual national forests since the National Forest Management Act (NFMA) was passed in 1976. AFRC has also been involved as a codefendant with the Forest Service in many lawsuits challenging forest plan decisions through individual timber sale projects.

FFRC is a national coalition of small and large companies and regional trade associations across the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure timely and effective access to federal lands to sustainably produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

I am an attorney with over two decades of litigation experience involving national forest management. I also have a forest management degree and the lawsuits halting sound forest management in the early 1980s motivated me to go to law school. Before joining AFRC as a staff attorney last year, I was in private practice representing local governments, resource users, and landowners who have intervened in lawsuits to support the Forest Service. I have represented Mineral County Montana, Apache County Arizona, and Boundary County Idaho defending the Forest Service in cases challenging both forest plans and forest management projects.

We have many concerns with the Forest Planning rule. Along with my testimony, I would like to submit for the record the official comments filed on the proposed rule by the AFRC. While the rule is long and complex and our concerns many, I will focus my comments to six points. First, the proposed planning rule will increase the complexity, cost, and time for the Forest Service to complete forest plans. Second, of greater concern, is that the planning rule will make the projects that implement the plans more vulnerable to lawsuits than they are today. Third, the proposed planning rule nullifies, rather than builds upon, the hard fought court victories the Forest Service achieved in the last decade to allow them to implement badly needed forest management projects. Fourth, the viability section of the planning rule is the prime example of the first three problems. Fifth, the proposed forest planning process allows local planners to establish unworkable, defacto regulations shielded from the view of Congress and the Secretary. Finally, the proposed planning rule will have the planning team tied in knots chasing the mythical "best available science."

1. The planning rule will make forest planning even more complex, costly, and time consuming.

Budgets are tight and planning should not take forever. The combined forest plan revision process for the three Northeast Oregon National Forests began in 2004. Seven years later, a draft forest plan has not even been produced for public comment. There is a need for a far less complex and costly planning process which can be completed in a time frame which allows meaningful public input. Instead the proposed rule will increase the Forest Service's analytical burden and expense. The Forest Service's own analysis of the rule concludes it will not save much time and money. The rule has a multitude of "shalls" and "musts," with the word "shall" used 55 times and "must" used 98 times. Based on my litigation experience, the commitments that the Forest Service makes in the proposed rule will vastly increase the expense and time to complete an acceptable forest plan.

A perfect example is the new requirement to conduct multiple "Assessments." 36 C.F.R. 219.6. The Assessment process creates a new legally enforceable obligation

to "Identify and evaluate information needed to understand and assess existing and potential future conditions and stressors in order to inform and develop required plan components and other content in the plan" and "the responsible official shall notify and encourage". . ."the public" and "appropriate". . .Federal agencies" and "scientists to participate in the assessment process." 219.6(a). The Assessments will presumably include non-federal scientists to help "inform" planning which will require compliance with the Federal Advisory Committee Act increasing delay and expense. The Forest Service is placing the subsequently developed Forest Plans at risk by requiring a process to develop Assessments with public participation and non-federal scientists that "inform" decisions in the plan without going through the NEPA process or complying with FACA. One alternative is to make the Assessments subject to NEPA and FACA but this will make the forest planning process even more unworkable. A better approach is to eliminate the Assessments section from the planning rule entirely.

The Assessments will overwhelm the planning team in interpreting how to comply with the new requirements. If the Forest Service does not "notify" and "encourage" plaintiffs' preferred scientists to participate, then does it violate the law? Does "notify" mean just publish a notice in the newspaper? Which newspaper—The Washington Post, the Washington Times, or the Stanford Daily? Does the Responsible Official have to write the scientist to "encourage" her to participate? Is a letter and a follow-up phone call enough "encouragement"? And who are the "appropriate" agencies and scientists? Certainly EPA would have to be notified and encouraged to participate in the Assessment given the proposed planning rule's emphasis on climate change and carbon sequestration. If a plaintiff can show that the Forest Service failed to do enough to "encourage" the participation of the so called "appropriate scientists" the agency will have violated the proposed rule.

The Assessment section will also create a powerful new tool for plaintiffs to attack any Forest Service analysis that looks and smells like an Assessment. For example, the proposed rule says an Assessment may be "a one-page report" and any resource analysis in the planning file arguably related to "ecological, economic, or social conditions, trends, and sustainability within the context of the broader landscape" qualifies as an Assessment and will violate the regulation if it was not prepared with public participation and appropriate scientists were not involved in its preparation. 36 C.F.R. 219.6, 219.19.

The great burden, complexity, and cost of the proposed rule is also illustrated by its treatment of wildlife. The rule and its Federal Register preamble (which is used by courts to interpret the rule) include multiple categories of species. The Federal Register explains: "There are several categories of species that could be used to inform the selection of focal species for the unit. These include indicator species, keystone species, ecological engineers, umbrella species, link species, species of concern, and others." 76 Fed. Reg. at 8498 (Feb, 14, 2011). Some of the species are probably mutually exclusive but other species overlap creating a planning nightmare. The forest planning rule should instead focus on habitat, a factor over which the managing agency has some control.

Finally, the proposed rule expands the Forest Service obligations not only during the heart of the planning process but also at the beginning and the end of the planning process. At the beginning of the process, the Responsible Official "shall" encourage participation by a long list of groups under 36 C.F.R. 219.4. At the end of the process the Responsible Official "must" monitor the "status of focal species". . ."measurable changes on the unit related to climate change and other stressors" and "the carbon stored in above ground vegetation." 36 C.F.R. 219.12.

Under President Obama's Executive Order 13579 signed January 11, 2011, rules are supposed to be made more cost effective, less burdensome, and more flexible. The proposed planning rule does just the opposite and creates new mandatory obligations on Forest Supervisors and Regional Foresters for which the Forest Service has no means of compliance.

2. The planning rule will impede, rather than ease, the implementation of forest restoration projects with more costly, time consuming procedure for projects.

The proposed planning rule is supposedly designed to avoid long delays, excessive costs, and litigation. Unfortunately, the proposed planning rule strikes out in all three areas because the rule will increase the complexity and the analytic burden, not just of preparing the forest plan itself but of the projects that implement the plan. Approximately 75% of project preparation cost is for analysis to comply with the National Environmental Policy Act, the forest plan, and the planning rules such as viability and management indicator species. The Forest Service seems to have forgotten that it is not the plans sitting on the shelf that treat the diseased and

fire prone forests, but the projects that implement those plans. The proposed rule fails to take the steps needed to aid and support the projects that implement the plans.

Projects are greatly constrained by the proposed forest planning rule. First, each and every project must comply with every substantive standard in the forest plan. The proposed rule requires that "every project" must comply with "plan components." 36 C.F.R. 219.7(d). And the "plan components" are extensive. Plan components are mentioned 45 times in the rule. In the Sustainability Section 219.8, alone, forest plans "must include plan components" to "maintain, protect, and restore" aquatic elements, soils, and rare plant and animal communities."

Second, the proposed planning rule does nothing to ease the procedural and analytical burden for projects. For example each and every project must repeat the analysis of how the project will maintain "a viable population of a species" and provide "sustainable recreation opportunities" because these are analytical "plan components" of the rule. 36 C.F.R. 219.8(b)(2), 219.9(b)(3). These are forest level questions best answered at a larger scale that should not have to be answered again and again in the analysis for each project.

The Forest Service needs to carefully reconsider how the proposed rule will substantively limit management flexibility for projects and will weigh down an already overburdened project preparation process. The Forest Service, for instance, is currently embarking on a NEPA analysis of a large-scale bark beetle infestation in the Black Hills. We understand that this analysis will consume 12 to 14 months. Imposing project specific analysis on such a scale will only delay badly needed forest health treatments that can help check the spread of infestation and make the forest more resilient in the future, the very goals the proposed planning rule claims to promote.

3. The planning rule would cast aside significant Forest Service court victories.

One of the most disheartening flaws of the proposed rule is the abandonment of favorable legal precedents that the Forest Service has established after nearly 30 years of litigation over NEPA and the provisions of the 1982 forest planning rule. This is particularly frustrating for AFRC which has worked hard to defend Forest Service decisions and establish that they have discretion in implementing the existing planning regulations and is not bound by costly data collection and scientific proof requirements. Instead of building on these legal victories and streamlining and narrowing the existing planning rule, the proposed planning rule concedes precious legal ground and builds a strong foundation for future legal defeats.

The examples below are only a few of the areas where the planning rule will make the Forest Supervisor's job much harder by eliminating or undermining Forest Service legal victories.

- The proposed rule abandons the major victory in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)(en banc) that affirmed that the Forest Service has discretion in it management decisions. The proposed rule adopts many non-discretionary requirements where the responsible official "must" or "shall" adopt a specific management approach. For example, under Section 219.8 "the plan must provide for. . .ecological sustainability," whatever that means.
- The proposed rule abandons the victory in Seattle Audubon Society v. Moseley, 830 F.3d 1401, 1404 (9th Cir. 1996) which upheld selection of an alternative in the Northwest Forest Plan that provided an 80% rather than 100% probability of maintaining the viability of the spotted owl because "the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA." The proposed rule does not even mention the term "multiple-use objectives" in Section 219.9 which covers diversity and viability. The rule completely ignores the clear language of NFMA that says diversity is a goal to be provided "in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B).
- The proposed rule abandons the victory in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008)(en banc) that builds on the Mosely case that viability is not the only factor the Forest Service must address in developing forest plans. "NFMA. . .requires that plans developed for units of the National Forest System 'provide for multiple use and sustained yield of the products and services obtained there from.'. . .the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site-specific plans for National Forest System lands." Id. at 990 (emphasis added).
- The proposed rule abandons the victory in Lands Council v. McNair, 537 F.3d 981, 991–92, (9th Cir. 2008)(en banc) that the Forest Service doesn't have to

consider any and every scientific study or alternative methodology when it evaluates its land management options. The proposed rule in the Section 219.3 requires the Forest Service to verify "what information is the most accurate, reliable, and relevant" and Section 219.12 governing monitoring requires that "the responsible official. . .shall ensure that scientists are involved in the design and evaluation of unit and broad scale monitoring." 219.12 (c)(4). While the Forest Service should base its decision on sound scientific knowledge, as well as legal mandates and the experience of local officials and stakeholders, the proposed rule elevates an ideal conception of science to a legally controlling, and unattainable, requirement.

- The proposed rule abandons the victory in Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359 (9th Cir. 1994) that "NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." The propose rule imposes in Section 219.3 an independent requirement beyond NEPA that the responsible official for the forest plan "determine" and justify what is the "best available scientific information."
- The proposed rule abandons the victory in Greater Yellowstone Coalition, Inc. v. Servheen, 672 F.Supp.2d 1105, 1114 (D.Mont. 2009) that held "[w]hen Forest Plans contain standards, the standards are 'mandatory requirements,' in contrast to guidelines, 'which are discretionary.' The proposed rule throws this victory away because Section 219.15 defines both standards and guidelines as mandatory.
- The proposed rule abandons the victory in Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2372, 2382 (2004) that land use plan monitoring is not a "binding commitment in terms of the plan." Although the Norton case involved the monitoring provisions of a BLM management plan, it is a helpful victory that recognized the agency has flexibility if the agency itself has not created a binding commitment. Unfortunately, in Section 219.12, Monitoring, the longest and most detailed section of the planning rule, the Forest Service sets forth extensive and detailed monitoring requirements replete with the word "shall" that will be undermine the Norton victory.

4. The proposed rule's changes to the "viability rule" make it worse, not better.

The term "species viability" in not found in the National Forest Management Act. The Act itself only refers to developing "guidelines" which "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. 1604 (g)(3)(B). The term "viability" was added to the planning regulation in 1982. Since then, the so-called "species viability rule" has been the centerpiece of two decades of litigation by environmental groups who were generally successful in persuading courts to second guess Forest Service decisions and impose delays for costly, time consuming species surveys. The high water mark was a decision in Ecology Center v. Austin, 430 F.3d 1057 (9th Cir. 2005) on the Lolo National Forest which held that the Forest Service had to prove with "clinical trials" similar to drug companies seeking approval of a new drug, that any harvest would have no adverse effect on wildlife.

It is critical to note that this legal fiction, created entirely from regulation and subsequent litigation, has not actually led to improved habitat conditions on large portions of the National Forest System. Rather, it has created a judicially enforced presumption that less management, on fewer acres, with mind-bogglingly complex selection criteria to identify lands available for management, will lead to greater species diversity and more healthy, vibrant forests. The reality on the ground has been continued declines for a number of species, less healthy and vigorous forests, and decreased ability to react to obvious threats to forest health.

Thankfully, in 2008 in Lands Council v. McNair, an en banc panel of 11 judges representing the entire Ninth Circuit unanimously reversed this line of cases for the Mission Brush Restoration Project in Idaho.

The good news is the Mission Brush decision established several important principles that help the Forest Service that apply to addressing species viability:

- The court held that judges "must defer to the Forest Service as to what evidence is, or is not, necessary to support wildlife viability analysis." McNair, 573 F.3d at 992.
- The court emphasized that "[g]ranting the Forest Service the latitude to decide how best to demonstrate that its plans will provide for wildlife viability comports with our reluctance to require an agency to show us, by any par-

ticular means, that it has met the requirements of the NFMA every time it proposes action." Id.

- The court emphasized that the National Forests are to be managed for multiple uses and that "the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site-specific plans for National Forest System lands." McNair, 573 F.3d at 990.
- The court concluded the Forest Service has flexibility in providing for wildlife viability and it is not the court's role to second guess how the Forest Service chooses to provide for wildlife viability. The court concluded "Thus, as non-scientists, we decline to impose bright-line rules on the Forest Service regarding particular means that it must take in every case to show us that it has met the NFMA's requirements." McNair, 573 F.3d at 994–95.
- The court endorsed the use of a habitat analysis to assess wildlife viability and did not require a population based analysis. So long as the analysis uses the best available information and confirms the type of habitat a species uses, a discussion of habitat changes is sufficient to demonstrate species viability. McNair, 573 F.3d at 992.

The bad news is, that the species viability section of the proposed planning rule does not build on the principles from this victory, rather it throws several of them under the bus, and moves in a direction that will make it even more burdensome than the current viability rule.

The proposed rule states:

> § 219.9 Diversity of plant and animal communities.
> Within Forest Service authority and consistent with the inherent capability of the plan area, the plan must include plan components to maintain the diversity of plant and animal communities, as follows:
> * * *
> (b) Species Conservation. The plan components must provide for the maintenance or restoration of ecological conditions in the plan area to:
> * * *
> (3) Maintain viable populations of species of conservation concern within the plan area. Where it is beyond the authority of the Forest Service or the inherent capability of the plan area to do so, the plan components must provide for the maintenance or restoration of ecological conditions to contribute to the extent practicable to maintaining a viable population of a species within its range. When developing such plan components, the responsible official shall coordinate to the extent practicable with other Federal, State, tribal, and private land managers having management authority over lands where the population exists.

- The proposed rule expands the viability requirement beyond vertebrate species to include "native plants and native invertebrates (fungi, aquatic invertebrates, insects, plants, and others)" which will make the cost of compliance soar and establish a regulatory standard that cannot be achieved.
- The proposed viability rule does not include the limiting phrase "to meet overall multiple-use objectives" (which explicitly modifies the "provide for diversity" language in NFMA) to make it clear that the Forest Service must provide for diversity of plant and animal communities to meet overall multiple use objectives and not the other way around. The proposed rule will undercut Forest Service victories where courts recognized that viability is not the engine that drives planning decisions. McNair, 537 F.3d at 990 ("the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site specific plans for National Forest System lands."). Id.
- The viability rule will require the Forest Service to demonstrate that every project will maintain viability since viability is a "plan component."

> *219.7 (d) Plan components. Plan components guide future project and activity decision making. The plan must indicate where in the plan area specific plan components apply. Plan components may apply to the entire plan area, to specific management or geographic areas, or to other areas as identified in the plan. Every project and activity must be consistent with the applicable plan components* (§ 219.15) (emphasis added).

This requirement will mean each and every localized project will have to demonstrate over and over again how the Forest Service will maintain viable populations of species of conservation concern across the forest.

- The definition of "species of conservation concern" is potentially limitless. The Responsible Official that approves a forest plan should have authority to determine a manageable list of species. Also, requiring a forest plan to provide a guarantee of viability for a species over which there is significant concern about viability requires the agency to guarantee something that it cannot. It

puts the burden on the Forest Service to prove it will maintain a viable population and invites litigation over the adequacy of the substantive requirements in the plan, survey obligations, and population monitoring. The approach of the rule essentially requires species specific plans like the lengthy and expensive lynx plan amendments prepared for Regions 1 and Region 2. NFMA requires the Forest Service to develop plans which "form one integrated plan for each unit of the National Forest System" 16 USC 1604 (f)(1)—not separate wolverine, fisher, goshawk, and black-backed woodpecker plans.

- The proposed rule requires conservation of Fish and Wildlife Service "candidate species" which require no protection under the ESA. The Forest Service has higher planning priorities than to devote its scarce resources to providing a conservation strategy in the forest plan to conserve every species for which the listing agency has not even decided whether to propose listing or made a determination to list.
- The proposed viability rule requires that the "The plan components must provide for the maintenance or restoration of ecological conditions to contribute to the extent practicable to maintaining a viable population of a species within its range. . ." This is an unattainable anti-degradation standard. The Ninth Circuit has emphasized in McNair that "[o]f course, neither the NFMA nor the. . .Forest Plan require the Forest Service to improve a species' habitat to prove that it is maintaining wildlife viability." McNair, 537 F.3d at 995. However, the proposed viability rule is written so that all "plan components" "must provide for maintenance and restoration," which creates a legal "non-degradation standard" for wildlife throwing away the victory in McNair.
- The reference to "population" in the proposed viability rule will require costly population inventories and lead to litigation to establish a population survey requirement which will be impossible to meet for species such as the wolverine which are difficult to detect. Instead, maintenance of habitat for the species should be the focus of the new viability rule.

5. The Proposed Rule establishes defacto regulations hidden from view of Congress and the Secretary.

By creating Forest Plan "standards," a planning team is able to impose significant, costly, and unsupported restrictions on resource management that have the effect of regulations (i.e.—the force of law). However, because forest plan standards are not formal regulations, Congress does not have the opportunity to reject them under the Congressional Review Act of 1996. 5 U.S.C. 801–808. And because forest plans are typically approved by the Regional Forester, the Secretary also has no oversight of these standards. Compliance with forest plan standards is the centerpiece of many lawsuits challenging projects that implement a forest plan. That is because the NFMA requires that "resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. 1604(i). So if there is a dispute over whether a particular project complies with a forest plan standard such as providing for "ecological sustainability" then it ends up in the courts where the judges decide what the standard means and whether a project violates the standard.

The courts have had several occasions to review the distinction between forest plan standards and guidelines as they are currently defined under the existing regulations. The courts have ruled in favor of the Forest Service and repeatedly rejected plaintiffs' arguments that the agency was legally compelled to follow a forest plan guideline. For example, in Wilderness Soc. v. Bosworth, 118 F.Supp.2d 1082, 1096 (D.Mont. 2000), the Ninth Circuit rejected plaintiffs argument that all old growth stands had to be a minimum of 25 acres. The court concluded that "the 25 acre minimum size requirement in the Forest Plan is a guideline and is therefore discretionary rather than mandatory." Id. at 1096. Similarly, in Greater Yellowstone Coalition, Inc. v. Servheen, 672 F.Supp.2d 1105, 1114 (D.Mont. 2009) the court noted that "[w]hen Forest Plans contain standards, the standards are 'mandatory requirements,' in contrast to guidelines, 'which are discretionary.' " The Forest Service should not toss aside these legal victories.

The proposed rule effectively eliminates the distinction between forest plan guidelines and standards making guidelines legally enforceable standards that all projects must "comply with." This change destroys the Forest Service hard fought legal victories establishing that guidelines are discretionary—not mandatory, and provide management flexibility.

§ 219.15 Project and activity consistency with the plan.

* * *

(d) Determining consistency. A project or activity approval document must describe how the project or activity is consistent with applicable plan com-

ponents developed or revised in conformance with this part by meeting the following criteria:

(1) Goals, desired conditions, and objectives. The project or activity contributes to the maintenance or attainment of one or more goals, desired conditions, or objectives or does not foreclose the opportunity to maintain or achieve any goals, desired conditions, or objectives, over the long term.

(2) **Standards**. The project or activity **complies with** applicable standards.

(3) **Guidelines**. The project or activity:

(i) Is designed to **comply with** applicable guidelines as set out in the plan; or

(ii) Is designed in a way that is as effective in carrying out the intent of the applicable guidelines in contributing to the maintenance or attainment of relevant desired conditions and objectives, avoiding or mitigating undesirable effects, or meeting applicable legal requirements (§ 219.7(d)(1)(iv)).

The proposed rule must not further constrain agency discretion and provide more litigation vehicles to challenge agency decisions. This would be the result of the proposed rule's elimination of the distinction between standards and guidelines and eviscerate the discretionary nature of guidelines by requiring that all projects "comply with" guidelines. The results will be an even more hide-bound decision making process, which sacrifices improved forest management on the altar of extensive process and analysis.

6. The planning rule must recognize that science is constantly changing and that no scientist can lay claim to the mythical "best" science.

The final significant problem with the proposed planning rule is that it imposes a legal duty that requires the planning team to decipher what qualifies as the "best available science" as if there was such a thing. Sound science has an important role in Forest Service planning and management. However, the proposed rule establishes costly, time consuming procedural requirements that the Forest Service "take into account" the best available science and demonstrate that the "most accurate, reliable, and relevant information" was considered and how it "informed" the development of the forest plan. 36 C.F.R. 219.3. This will slow the planning process to a crawl and create a new legal burden on the Forest Service to prove that it has "taken into account" the best available science in both the forest plan and implementing projects. Each project will have to repeat the analysis of the best available science.

The NFMA statute neither refers to, nor requires the use of, "best available science" or "best available scientific information." Neither does NEPA. The Ninth Circuit Court of Appeals has affirmed that these statutes do not require a determination of whether national forest planning or project-level NEPA documents are based on "best" available science or methodology, that disagreements among scientists are routine, and that requiring the Forest Service to resolve or present every such disagreement could impose an unworkable burden that would prevent the needed or beneficial management. Lands Council v. McNair, 537 F.3d 981, 991 (9th Cir. 2008)(en banc); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359 (9th Cir. 1994).

In Lands Council, a unanimous en banc panel of the Ninth Circuit gave the Forest Service more leeway and flexibility regarding scientific analysis. The Court emphasized that, "[t]o require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose." McNair, 537 F.3d at 1001. The Forest Service should recognize, as the Ninth Circuit finally has, that there is no holy grail of the "best" or "most accurate" science. Even NEPA does not require such impossible divining of the "best" science. The Ninth Circuit held that "NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." Salmon River Concerned Citizens, 32 F.3d at 1359.

The proposed rule ignores these legal victories that establish that there is no such thing as the "best" or "most accurate" science and will relieve plaintiffs of the burden to prove why the Forest Service decision is flawed. The Forest Service will now be forced to labor under the burden to prove why its decision "is informed by" the best science. The burden to prove that the Forest Service was arbitrary and capricious in its decision-making should remain with plaintiff and the regulations must strive to avoid placing the heavy burden of proof on the agency. The proposed rule states:

§ 219.3 Role of science in planning.

The responsible official shall take into account the best available scientific information throughout the planning process identified in this subpart. In doing so, the responsible official shall determine what information is the most accurate, reliable, and relevant to a particular decision or action. The responsible official shall document this consideration in every assessment report (§ 219.6), plan decision document (§ 219.14), and monitoring evaluation report (§ 219.12). Such documentation must:

(a) Identify sources of data, peer reviewed articles, scientific assessments, or other scientific information relevant to the issues being considered;

(b) Describe how the social, economic, and ecological sciences were identified and appropriately interpreted and applied; and

(c) For the plan decision document, describe how scientific information was determined to be the most accurate, reliable, and relevant information available and how scientific findings or conclusions informed or were used to develop plan components and other content in the plan.

The proposed rule undermines the principle that the Forest Service can make natural resource management decisions based on its discretion in weighing various multiple-use objectives rather than elevating science to the primary decision making factor. For example, the Ninth Circuit in Seattle Audubon Society v. Moseley, 830 F.3d 1401, 1404 (9th Cir. 1996) upheld selection of an alternative in the Northwest Forest Plan that the science indicated would provide an 80% rather than 100% probability of maintaining the viability of the spotted owl because "the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA." That Ninth Circuit in the Mission Brush case finally recognized that, "[c]ongress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress' early regulation of the national forests, it has never been the case that 'the national forests were. . .to be set aside for non-use'." McNair, 537 F.3d at 990.

Finally, the use and dissemination of scientific information by federal agencies is addressed by the Federal Data Quality Act (P.L. 106–554 § 515) and subsequent guidelines from the Office of Management and Budget (http://www.whitehouse.gov/omb/fedreg_reproducible). We believe that the protections and assurances of the quality of scientific information used and distributed by federal agencies under the Federal Data Quality Act is sufficient to ensure that quality of scientific information being used by the USFS in the planning process and a requirement to identify the "most accurate" scientific information should not be a legal requirement in the planning rule itself.

The planning rule must not require the Forest Service to do more than take into account available, relevant scientific information along with other factors in the development, amendment, or revision of national forest plans, without reference to which information is "best." Proposed Section 219.3 should be deleted or greatly abbreviated, along with any other references in the proposed rule to "best available scientific information."

Thank you for permitting me to testify.

Mr. BISHOP. Thank you.

Mr. Mumm?

STATEMENT OF GREG MUMM, EXECUTIVE DIRECTOR, BLUE RIBBON COALITION

Mr. MUMM. Good morning, Chairman Bishop and Members of the Subcommittee. I would like to thank you for the opportunity to be here this morning to testify. I am the Executive Director of the Blue Ribbon Coalition, which is often referred to as BRC. BRC has individual, business and organizational members in all 50 states. We champion responsible recreation and access, and we encourage individual environmental stewardship.

BRC has a longstanding interest in the protection of the values and the natural resources found on our public lands and waters, including those of the National Forest System. This morning I

would like to address each stated issue for this hearing, starting with the proposed planning rule.

From the outset, BRC has been extensively involved in the planning rule revision process. We are most concerned that in this current effort the Forest Service has strayed far from the core purpose for revising the planning regulations, and it has strayed from the congressional mandates of multiple use sustained yield. In fact, the proposed rule threatens to create new goals and criteria, which will exacerbate and not resolve the planning gridlock that is accelerating through the agency.

It is ironic that the agency continues to be mired in a decades long effort to make the process of forest planning more streamlined and more efficient, but it does not build on the lessons learned in prior efforts. Instead, it threatens a new vision fraught with uncertainty.

We support the need to revise the current planning rule, and if the fundamental underpinnings were correct, BRC would be the first to back such a rule. However, the proposed rule does not carry the broad support from those most affected by it because a long history demonstrates it will only make things worse. BRC is asking this Committee to urge the Forest Service to sear this effect back to its necessary focus to, one, fill the current regulatory void and, two, create efficiency and expediency in the forest planning process.

We are also concerned with travel management. The organized motorized recreation community supported the 2005 Travel Management Rule based on the growing importance of recreation on Forest Service lands, the need for clear management guidance and the recognition that effectively managed motorized recreation is a legitimate and productive use of the National Forest System.

The motorized transportation system is not a single faceted end product but a means to nearly every form of recreation and use on the national forest. Virtually everyone is motorized when they visit our national forests, even for the activities that are often labeled as nonmotorized.

The true economic impact of the motorized transportation network on the forest system is immense, but it is not properly quantified. Unfortunately, in many forests the TMR has been incorrectly interpreted by many preservationist interests within and beyond the Forest Service to justify landscape level closures, including well-established, mapped routes that are historically part of local transportation systems.

A wave of litigation has predictably followed publication of new motor vehicle use maps under the TMR, all of which has created additional means by which to threaten and paralyze effective local management. The changes following that litigation are often not predictable but can influence broader agency policy. In general, the end product of the TMR is more often not what was intended, and it is having a profoundly negative impact on dependent local communities.

And finally, recreation enthusiasts struggle with special use permits. At a time when Federally managed lands should be contributing to the economic vitality of our nation, it is unacceptable that the recreation permit process as it is currently implemented on the Forest Service lands is overly bureaucratic, expensive for both the

agency and the public and often applied in an unfair and arbitrary manner.

The current process no longer serves the public interest, nor does it support the goals and objectives of land use planning. Efforts to encourage the agency to modify and streamline the process have failed. We believe that congressional oversight and even legislation is necessary to encourage the agency to modify and streamline the permit process.

I appreciate this Subcommittee providing this oversight hearing, and I am happy to answer any questions or provide further information. Thank you.

[The prepared statement of Mr. Mumm follows:]

Statement of Greg Mumm, Executive Director, BlueRibbon Coalition

Dear Chairman Bishop and Members of the Subcommittee,

The BlueRibbon Coalition (BRC) would like to thank you for the invitation to testify regarding our concerns about management of the National Forest System.

BRC is an Idaho nonprofit corporation with individual, business, and organizational members in all 50 states. As a national recreation group that champions responsible recreation and encourages individual environmental stewardship, BRC focuses on enthusiast involvement through membership, outreach, education and collaboration among recreationists.

BRC members use motorized and non-motorized means, including off-highway vehicles, snowmobiles, horses, mountain bikes, personal watercraft, hiking and other means to access state and federally managed lands and waters throughout the United States, including those throughout the National Forest System. BRC has a longstanding interest in the protection of the values and natural resources found on those lands and waters, which it advances by (1) working with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors; (2) communicating with administrative officials, elected officials, policymakers, the media and the public, consistent with its nonprofit status; and (3) protecting and advancing its members' interests in the courtroom on specific matters implicating public lands and waters access issues.

EXECUTIVE SUMMARY

We appreciate the Subcommittee providing oversight on regulatory roadblocks to land use and recreation. If the reform of the National Environmental Policy Act or the Endangered Species Act could be described as ambitious giant steps toward more efficient regulatory framework for the management of Public Lands and National Forests, then revision of the U.S. Forest Service Planning Regulations would be a reasonable baby step. A rational and workable planning policy is absolutely essential for the future of our National Forest System.

The U.S. Forest Service (USFS) freely admits that its current planning regulations are costly, complex and procedurally burdensome. Sadly, the USFS has proposed new planning regulations that only make the situation worse. The new "Proposed Planning Rule" threatens to create a situation that will exacerbate, not resolve, the planning gridlock accelerating through the agency.

At a time when federally managed lands should be contributing to the economic vitality of our nation, it is unacceptable that the recreation permit process as it is currently implemented on U.S. Forest Service lands is overly bureaucratic, expensive for both agencies and the public and often applied in an unfair and arbitrary manner. The current process no longer serves the public interest nor does it support the goals and objectives of land use planning. Oversight, and perhaps ultimately legislation, is necessary to encourage the agency to modify and streamline the permit process.

The organized motorized recreation community supported the 2005 Travel Management Rule (TMR) based on the growing importance of recreation on Forest Service lands, a need for clearer management guidance and the recognition that effectively managed motorized recreation is a legitimate use of the National Forest System.

Motorized recreation is not a single faceted end product, but a means to nearly every form of recreation on National Forests. Virtually any recreationist relies on vehicular transport from their place of residence and along the Forest transportation network, even for activities some would label "non-motorized" such as hiking,

backpacking, photography or nature study. The true economic impact of the motorized transportation network on the National Forests is immense but not properly quantified.

A primary impetus for the 2005 TMR was to eliminate "open" designations and to inventory and regulate the associated network of "user created" or "unauthorized" routes. Unfortunately, the TMR has been incorrectly interpreted by many preservationist interests within and beyond the Forest Service to justify landscape level closures of not only "user created" routes but well established, mapped routes historically part of local transportation systems. In some areas this flawed approach has resulted in significant reduction in available public recreation resources and strained relationships with state and local governments.

SUMMARY OF CONCERNS WITH THE PROPOSED PLANNING RULE

From its outset BRC has been extensively involved in the Planning Rule revision process. We have provided the consistent message of concern that in this current effort to develop a new Planning Rule, the Forest Service has strayed far from the core purpose for revisiting the agency's planning regulations. In fact, the Proposed Rule threatens to create new, undefined goals and criteria which will exacerbate, not resolve, the planning gridlock accelerating through the agency. It is ironic that the agency continues to be mired in a decades long effort to promulgate valid rules intended to make more streamlined the content of Forest Plans and more efficient the process by which they are created. At the risk of belaboring the obvious, it should not take a Forest 10, 8 or even 5 years to revise Forest Plans, which are supposedly obsolete in 10 years. The Proposed Rule does not attempt to build on the lessons learned in prior efforts, but instead threatens a new vision fraught with uncertainty.

BRC has consistently urged the Forest Service to steer this effort back to its necessary focus to: (1) fill the current regulatory void; and (2) create efficiency and expediency in the Forest planning process.

There have been repeated requests by organizations (including BRC), retired Forest Service personnel, local government entities, individuals, and even members of Congress to take the time to collect all the necessary information to properly inform the process and get this right this time. Getting it right will require detailed analysis of the wave of public input and changes to the current product. The Forest Service has not heeded these diverse requests, but continues to push for completion in 2012, conspicuously before the upcoming general election. We cannot help but question whether this rush is politically motivated. If so, we emphatically state that proper management of our public lands and their resources is most certainly not the place to garner political favor.

Sadly, the Forest Service appears singularly focused on this defined path with little change in the determined direction. In spite of input from experts, local entities and citizens who are most connected to and affected by the outcome, by all indication, the Forest Service is resolved to inexorably adopt something very close to the current Proposed Rule. If its fundamental underpinnings were correct, BRC would be the first to back such a rule. However, this Proposed Rule does not carry the broad support from the spectrum of those affected because a long history demonstrates it will make things worse.

To summarize BRC's overarching concerns:

- The proposed Planning Rule continues to stray far from congressional multiple use mandates, including the mandate to provide a wide range of diverse recreation. Simply including references to recreation in the proposed Planning Rule is not sufficient to comply.
- The proposed Rule fails to meet the purpose and need. It fails to make the Forest Planning revision process less costly, burdensome and time consuming.
- The proposed Rule fails to prioritize creating and protecting jobs and providing a wide range of diverse recreational activities.
- The proposed Rule inappropriately emphasizes preservation over multiple use
- The proposed Rule injects "viable population" requirements suspiciously close to provisions in the 1982 Rule which litigants used to hamstring countless agency projects.
- Efforts to address the use of science will not properly insulate agency discretion but provoke improper debate over what/whose "science" is "best" which will delay the process and make agency decisions more vulnerable.
- New terms and concepts and the dilution of established definitions are confusing and create fertile ground for increased litigation.
- "Public engagement" requirements distance the decision making process from the local area and potentially make plans more vulnerable to litigation.

- Monitoring requirements are unrealistic and would eat up budgets for on-the-ground work.
- The Scientists' Review of the Proposed Regulations threatens violation of the Federal Advisory Committee Act,

Note: An expanded version of the above bullet list, along with comments on specific sections of the Proposed Planning Rule can be found in the attached formal BRC Comments on the FS Planning Rule DEIS or found on the web at: http://www.sharetrails.org/uploads/BRC_Comments_on_FS_Planning_Rule-DEIS_05.16.11_FINAL.pdf

SUMMARY OF CONCERNS WITH TRAVEL MANAGEMENT

The organized motorized recreation community supported the 2005 Travel Management Rule (TMR) based on the growing importance of recreation on Forest Service lands, a need for clearer management guidance and the recognition that effectively managed motorized recreation is a legitimate use of the National Forest System.

Motorized recreation is not a single faceted end product, but a means to nearly every form of recreation on National Forests. Virtually any recreationist relies on vehicular transport from their place of residence and along the Forest transportation network, even for activities some would label "non-motorized" like hiking, backpacking, photography or nature study. The true economic impact of the motorized transportation network on the National Forests is immense but not properly quantified.

As noted above, the primary impetus for the 2005 TMR was to eliminate "open" designations and to inventory and regulate the associated network of "user created" or "unauthorized" routes that were created by a legacy of "open" designations. Unfortunately, in many Forests the TMR has been incorrectly interpreted by many preservationist interests within and beyond the Forest Service to justify landscape level closures of not only "user created" routes but well established, mapped routes historically part of local transportation systems.

Many units have proceeded from the flawed, if not illegal, assumption that motorized access inherently causes impacts and should be prohibited unless the complete absence of impacts or controversy can be established by continuing use advocates.

Trail based recreation is a complex subject. Effective management requires an understanding of the particular demand, opportunities and user behavior in any given locale. The Forest Service generally lacks personnel with the specialized knowledge to evaluate and implement this understanding. In the rare instances where it exists, recreation specialists' (e.g. Trails Unlimited) input is not followed.

A wave of litigation has predictably followed publications of new Motor Vehicle Use Maps under the TMR. The changes following that litigation are often not predictable but can influence broader agency policy. Examples include preservationist emphasis on the Subpart A minimum road system, Subpart C snowmobile exemption and duty to "minimize" impacts, all of which have created additional means by which to threaten local managers and paralyze effective local management of National Forests.

SUMMARY OF CONCERNS WITH SPECIAL USE PERMITS

Special Recreation Permits (SRP) are supposed to be a tool for managing recreation use; reducing user conflicts; protecting natural and cultural resources; informing users; gathering use information; and obtaining a fair return for commercial and certain other uses of public land.

The recreation permit process as currently implemented on Forest Service managed lands is overly bureaucratic, expensive for the agency and the public, and often applied in an unfair and arbitrary manner. Efforts to encourage the agency to modify and streamline the process have failed, even when those efforts were supported by agency policy. The current process no longer serves the public interest or supports the goals and objectives of land use planning. The recreation permit process must be revised.

The permitting process has become so complicated and costly that most "nonprofit club events" simply cannot comply with the requirements. In addition, historic and popular competitive events that have been occurring without problems have recently been subjected to arbitrary fees. In some areas, the application process to obtain an SRP is being used to prohibit and/or severely restrict otherwise allowable activities. Even where internal solutions are proposed by regulation or individual units, they have been challenged or applied inconsistently. A legislative solution is needed.

BRC and other recreation stakeholders have appealed to legislators to pass legislation that will modify and streamline Special Recreation Permit/Special Use Permit direction to better serve the public interest and support the goals and objectives of

land use planning. We believe legislation is necessary to increase efficiency and efficacy of the process to permit various recreation activities on National Forests. While this hearing focuses on the Forest System, virtually identical issues plague lands managed by the Department of Interior. Specifically, this legislation will direct the Secretary of Agriculture and the Secretary of the Interior to make the following changes:

- Historic and regularly permitted events held by non-commercial clubs or organizations that occur on roads, trails and areas designated for public use should be approved based on prior or expedited analysis, so that little or no new analysis is required for the permit process.
- Nonprofit clubs should be recognized as distinctly different from commercial operations, outfitter and guide businesses, ski areas and other private for profit enterprises.
- Recognizing that increased partnering with public lands users will become necessary as budgets tighten, there is a need to leverage the resources available from clubs and organizations that hold events on National Forests and Public Lands. Competitive event SRP applicants should be credited for work performed, such as trail maintenance, and the credit applied towards any "cost recovery" fees.
- Currently, cost recovery is not required if the permit can be authorized with no more than 50 hours of staff time. 49 hours of staff time is free, but 51 hours is billed at 51 hours. The first 50 hours should be free, regardless of the total number of hours.

These are but a few of the examples of the illogic of the existing situation. It is time for change.

Mr. BISHOP. Thank you.

Dr. Stewart?

STATEMENT OF DR. RON STEWART,
NATIONAL ASSOCIATION OF FOREST SERVICE RETIREES

Dr. STEWART. Thank you.

Mr. BISHOP. Make sure you are turned on there.

Dr. STEWART. OK. Thank you.

Mr. BISHOP. All right.

Dr. STEWART. I am pleased to be here representing the National Association of Forest Service Retirees. I am a volunteer and here at my own expense, and that is because I believe in the subject.

I have been the chair of the Forest Service Regulations Review Team for the last two efforts of forest planning regulation proposals, and I am reminded that the last responsibility I had before leaving the Forest Service in 1999 was rolling out what was supposed to be the ultimate solution to planning regulations under Chief Dombeck. There have been several others that have never seen the light of day that were internal and others that have ended in litigation.

In response to the agency's request for comments, we provided a detailed written response, and with your permission I would like to include a copy of the full comments that we provided as part of our record.

Mr. BISHOP. We will assume that is part of your written testimony.

Dr. STEWART. Yes. Thank you. I would like to focus today on five key issues: the document and process complexity, the NEPA requirements and analysis, the diversity requirement, the use of best science and the impact on local communities.

The complexity issue. We believe that the overall content of the proposed rule is overly ambitious and optimistic. It will be complex, costly, and it promises much more than it can deliver. Rather than

providing a simplified, streamlined process for developing and amending plans, we fear that the opposite will result, and I think several of the other witnesses this morning have alluded to the same thing.

Further, the proposed planning regulations purport to establish new purposes and priorities for the national forests and grasslands, such as dealing with climate change and providing ecosystem services for which there are no statutory authorities.

With current and anticipated Federal budgets and the low levels of management activity anticipated for National Forest System lands, it may be timely and beneficial to American taxpayers to model forest planning on Chief Pinchot's The Use of the National Forest concept. I have a copy of that here. This was given to every forester. It was to be kept in their pocket wherever they went. I note that the proposed planning regulations are 48 pages, 30 of which just describe what the planning regulations are supposed to do. This is 42 pages.

Now, I recognize that this is overly simplistic in today's environment and with the complex rules and regulations and public interests. However, I still think the concept is sound, the bare minimum written in plain language so anybody can understand it.

The National Association of Forest Service Retirees strongly recommends that the rule for planning for national forests and grassland management be simplified to a land zoning process with articulation of purposes for and expectations of management activities, uses and outcomes for each zone. Analyses should reflect only the requirements of the Multiple Use Sustained Yield Act, the National Forest Management Act and other relevant Federal statutes such as the Endangered Species Act, Clean Air Act and Clean Water Act.

Forest planning and NEPA. The proposed planning rule contributes to complexity by forgetting or perhaps ignoring a unanimous Supreme Court case that ruled that a forest plan, in this case the plan for the Wayne National Forest, did not affect the environment because it was not ripe and therefore not justiciable. This is Ohio Forestry Association, Petitioner v. The Sierra Club.

The court's decision stated, "As this court has previously pointed out, the ripeness requirement is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Clearly the proposed rule and ensuing forest plans will not have concrete effects on the ground until projects under those plans are actually proposed, and it is at the project level that NEPA should be used.

We strongly recommend dispensing with NEPA requirements for the planning rule, not dispensing with public input because that is extremely important, but for requirements for the planning rule and for the forest plan revisions and amendments since there is no commitment to any activity on the ground or preclusion of further plan amendments to allow activities and no effect on the environment of the planning actions themselves.

Maintaining diversity. We are pleased that the proposed rule no longer requires providing for species diversity at the population level and recognizes that Forest Service lands provide only a portion of the needed habitat for species as part of a larger landscape. However, it now requires that they measure and provide in the forest plan to maintain—I am sorry. History has shown that the maintenance of viable populations is impossible and that it is not the responsibility of the Forest Service to do that.

My time is up, so I will just stop there, and you will have the rest of my comments in the record.

[The prepared statement of Dr. Stewart follows:]

Statement of Dr. Ronald E. Stewart, Forest Service Planning Regulations Review Team, National Association of Forest Service Retirees

Introduction

I am pleased to be here this morning representing the National Association of Forest Service Retirees (NAFSR) on the subject of the most recent Forest Service draft forest planning regulations released in the Federal Register Volume 76, Number 30, pages 8480–8528, published on February 14, 2011 for public review. The NAFSR is a non-profit, non-partisan organization dedicated to the promotion of the ideals and principles of natural resources conservation upon which the U.S.D.A. Forest Service was founded. It is committed to the science-informed sustainable management of national forests and grasslands for the public good.

NAFSR selected a team of its members to evaluate the most recent draft forest planning regulations proposal. I served as the leader of this team. The team had a combined length of service of more than 150 years and breadth of experience including the Office of General Counsel and former line officers, from District Ranger, Forest Supervisor, Regional Forester, Station Director and Deputy Chief spanning five Regions, an Experiment Station and the Washington Office. We also received individual comments from several of our members that have been incorporated in our response. A number of these comments included information provided to our members by local government officials.

In response to the Agency's request for comments, we provided a detailed written response, including recognition of positive aspects of the draft regulation. I have included a copy of our comments for the Record of this Hearing. In my testimony, I will focus on five key issues: document and process complexity, NEPA requirements and analysis, the diversity requirement, use of best science, and the impact on local communities.

Complexity

We believe that the overall content of the proposed rule is overly ambitious and optimistic, complex, costly, and promises much more than it can deliver. Rather than providing a simplified, streamlined process for developing and amending plans, we fear that the opposite will result. This is especially troubling in what are likely to be difficult times for funding of federal programs of all kinds.

Without addressing the critical issue of the fundamental purposes of the National Forest System in this age of controversy, it is unlikely that any of the current controversies involving the purposes for and uses of national forests and grasslands will be resolved by the proposed rule. This issue must be addressed by Congress if there is to be a change from core principles and purposes as set forth in the Multiple Use Sustained Yield Act (MUSY) and reaffirmed by Congress in the National Forest Management Act (NFMA) of 1976. Nonetheless, the proposed planning regulations purport to establish new purposes and priorities for the national forests and grasslands, such as dealing with climate change and providing "ecosystem services," for which there are no statutory authorities. One might stretch the legal provision of "without impairment of the land" to include management for "ecosystem restoration," however, this should be clearly stated or clarified by Congress.

While the proposed rule is thorough, it is long and tedious to read. At the same time, it is short on useful and workable details—and the devil is in the details. We are told that more information on how the promises in the rule and explanatory materials will be fulfilled will be found in the Forest Service Manual and Handbook Directives to be issued at a later date. Unfortunately, given the lack of trust of the Agency among many of the most vocal and litigious members of the public, this is not likely to bring much comfort. Further, while many of the goals in the proposed

rule are commendable, such as coordinating across the landscape, they may be unattainable. **With current and anticipated federal budgets and the low levels of management activity anticipated for National Forest System lands, it may be timely and beneficial to American taxpayers to model forest planning on Chief Pinchot's "The Use of the National Forests" concept.**

NAFSR strongly recommends that the rule for planning national forest and grassland management be simplified to a land-use zoning process with articulation of purposes for and expectations of management activities, uses, and outcomes for each zone. Analyses should reflect only the requirements of MUSY, NFMA, and other relevant federal statutesuch as the Endangered Species Act, Clean Air Act and Clean Water Act.

Forest Planning and NEPA

The proposed planning rule contributes to complexity by forgetting, or perhaps ignoring, a unanimous Supreme Court case that ruled a forest plan, in this case the plan for the Wayne National Forest, did not affect the environment, was not "ripe" and therefore was not judiciable (OHIO FORESTRY ASSOCIATION, INC., PETITIONER *v.* SIERRA CLUB et al. May 18, 1998).

The proposed rule itself is accompanied by a Draft Environmental Impact Statement (EIS) that finds a lack of effect on the environment from a programmatic regulation or forest plan. The Court's decision stated: "As this Court has previously pointed out, the ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " Clearly, the proposed rule and ensuing forest plans will not have concrete effects on the ground until projects under those plans are actually proposed.

NAFSR strongly recommends dispensing with NEPA requirements for the planning rule and for forest plan revisions and amendments, since there is no commitment to activities on the ground (or preclusion of further plan amendments to allow activities) and no effect on the environment of the planning actions themselves. The intent, however, is not to eliminate the public engagement process in developing forest and grassland plans. In the interest of full display NAFSR would like to see an economic analysis of the cost of implementing the planning rule.

Maintaining Diversity

We are pleased that the proposed rule no longer requires providing for species diversity at the population level and recognizes that Forest Service lands provide only a portion of needed habitat for species as part of a larger landscape. NFMA requires diversity only at the ecological community level. However, the proposed rule does not include the phrase "to meet overall multiple-use objectives" to make clear that the Forest Service obligation to and purpose for providing diversity of plant and animal communities is in the context of the balance required to meet overall multiple-use objectives.

Maintaining viable populations of any species should not be a requirement of the planning regulations because there is no such requirement in the NFMA or any other federal statute. Perhaps this is for good reason, as population viability is an outcome influenced by many factors beyond habitat and outside of the control of a national forest or grassland. Further, it is an outcome only discernible at some distant point in the future. Measuring and proving that a forest plan will "maintain" a viable population is impossible, leaving the Forest Service vulnerable to lawsuits. The proposed rule also creates a new obligation to "conserve" fish and wildlife species that are "candidates" for listing under the Endangered Species Act (ESA). This will require that the agency develop recovery-like plans for conservation of candidate species even though recovery plans are not required for unlisted species by the ESA. It will also provide additional fertile ground for litigation.

Under the Public Trust Doctrine, state and other federal agencies are mandated to manage species viability at the population level. Since maintaining viability of any plant or animal populations remains challenging and technically infeasible, the agency has necessarily relied on surrogates and predictive models to satisfy this requirement. If as we maintain, this requirement is unachievable, the requirement itself may be invalid. Thus, we commend the agency for returning to the original language of NFMA and focusing on maintaining the diversity of plant and animal communities in the planning area with consideration of the role that the national forests and grasslands play in the larger landscape.

The proposed species diversity approach using "fine" and "coarse" filters may be an improvement over the current process, but will also become the subject of future litigation. Additionally the regulation proposes to expand the "maintain viable populations" requirement to include invertebrates such as slugs and insects, plants, and fungi. This will end up continuing the futile exercise of "survey and manage" that brought forest activities to a snail's pace, if not to a grinding halt in the range of the northern spotted owl.

NAFSR strongly recommends reliance on the NFMA requirement for diversity in order to meet overall multiple-use objectives and coordination with the states and other federal agencies responsible for population management under state statutes or the ESA for all other species concerns in forest and grassland planning.

"Use of Best Science"

The Forest Service has chosen to place in regulation at draft Section 219.3 mandatory requirements that the agency extensively document and then determine what constitutes "best available scientific information" in the planning process. While a laudable objective, this requirement is nothing short of astonishing in view of the volume of litigation which has burdened the agency in recent years, much of it involving contested science.

To place such a regulatory burden on the agency is unwise, unnecessary as a matter of policy or law, unfunded, unstaffed and (as far as we know) unprecedented in federal regulation on such a broad scale. Not only must the agency take into account "best science," but such science must be documented and an explanation given regarding how it was considered.

Science does not come labeled "good, better, best" and its adequacy is often a matter of professional judgment or the "eye of the beholder." The draft regulation mandates the consideration of rapidly evolving scientific fields in which there is substantial disagreement within the scientific community. Yet the above quoted regulation would require the responsible Forest Service officer to determine which scientific information is "the *most* accurate and reliable" in every field. This is an impossible burden. Further, there are valid, non-scientific sources of knowledge relevant to forest planning, such as local accumulated wisdom from years of experience and "trial and error."

NAFSR strongly recommends that forest planning use science and other sources of knowledge that are applicable and relevant to inform analyses and decisions.

Impact on Local Communities

The necessity and difficulty of local engagement in planning increases as the agency increases its attempt to plan, coordinate, and implement programs and activities at the landscape level. The Forest Service Planning Regulations should assure Forest Plans are written in partnership with the states in which the National Forest is located and in consideration of local, regional, and national needs and concerns. It is also important to retain intergovernmental coordination in the proposed rule. Communities—including Tribal entities—in close proximity to or socially and economically dependent on a national forest or grassland should be a partner in developing a National Forest Land Management Plan. The final rule should include provisions for land exchanges, conveyances and adjustments with states, communities and tribal entities.

However, while local government coordination is essential, this requirement places a heavy burden on the limited resources available at the local level. This is especially true now as local governments find themselves with reduced budgets and staffing.

Counties and communities will need help, not additional paperwork and staff time.

Concluding Remarks

The Forest Service has attempted in good faith to revise the original planning regulations a number of times beginning in the early 1990's with no real success. My personal experience suggests that the problem is not so much in the process itself but in the polarization of the various interest groups around their individual values and preferences. While values and preferences inform our judgments about what is acceptable and right, rarely do people base their public arguments for or against a proposed action or activity on this basis. Rather, all sides exploit uncertainties in the science to advance their point of view. In response, the Agency produces larger and more complex documents with lengthy discussions of the science. Since the underlying differences in values and preferences are never identified, understood, and evaluated in the final decision, the issues are not resolved and frequently end in appeals and litigation.

Mr. BISHOP. Thank you. I appreciate that.

We will now turn to questions for the witnesses. I am going to go at the very end, so, Mr. Tipton, if you would like to start this off—you were the first one here—I would appreciate it.

Mr. TIPTON. Well, thank you, Mr. Chairman and Ranking Member. I appreciate you pulling this together. I would like to note that my questions are going to be focused primarily around the special use permits as regards to water.

Chief Tidwell, I appreciate you and the rest of the panel members being willing to be here today. I have a concern that I know that you are aware of. We had issued a letter to Secretary Vilsack. My office was not contacted about the implementation of this new clause regarding water rights for the State of Colorado for the ski industry, for our grazing permits, at any time, and I had to request a meeting with Forest Service representatives before any information was offered to my office on this issue.

During the October 12 meeting, I was informed that the new clause would be signed within a month with little or no outreach to Region 2 of the Forest Service or to the communities and industries affected by this requirement. I would like to know, how does the agency justify this lack of public notice, and particularly when enacting a requirement that could have massive impacts on a variety of economies in Colorado?

Mr. TIDWELL. Mr. Congressman, we did issue an interim directive on one of the clauses that we use in our ski area permits. The intent of that was to clarify the clause that we put in place in 2004 to address water rights with ski areas. There was an urgency with a ski area that exchanged hands this fall to be able to move forward, and we issued that permit to that new operator. There was some urgency to be able to get this interim directive out so that we could move forward and that operation could continue. The intent was to clarify what we put in place in 2004.

Mr. TIPTON. OK. Well, we are talking about urgency, and for the Forest Service, to be clarifying, I would like to refer you back. There was a Federal Water Rights Task Force, 1996, that was addressing this very concern. The task force concluded, "Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish part of their existing water supply or transfer their water rights in the United States as a condition for the grant or renewal of Federal permits." So don't you see that you are in conflict with the will of the Congress?

Mr. TIDWELL. It is my understanding of that task force report that it was referring to in-stream flow, in-stream flows. Since then there has been numerous court decisions that have supported that the Forest Service does have the authority and also the responsibility to use the terms and conditions to protect the public's interest when there is a need with water. So we have continued to use our terms and conditions with our special use permits to protect the public's interest, to protect the resource and then allow for the occupancy and use of these lands.

Mr. TIPTON. You know, during some of our conversations you had brought up use for the ski resorts, snow making, to be able to have ponds and to be able to irrigate for our ranchers, to be able to develop that.

Just from your comment right now, I think you probably highlighted one of the concerns. You said other uses. What provisions are going to be in this new rule that is going to guarantee that the ski areas, our ranchers are going to be able to irrigate, they are going to be able to make snow, or are you going to be able to hijack that water?

Mr. TIDWELL. The intent of our clause in the ski area permits is to tie the water to the use. When we make a decision—and with ski areas it is a very long-term decision, 40 years—a commitment to develop these lands for recreational uses for the public, when water is necessary to make that a viable operation we want to make sure that the water stays connected with that permit so that the public can continue to enjoy in this case downhill skiing.

Mr. TIPTON. Have you ever had any examples to where a water permit has been sold off?

Mr. TIDWELL. No.

Mr. TIPTON. So there really isn't a concern.

Mr. TIDWELL. The concern is what could occur in the future and especially as water becomes more and more valuable. You know, the concern is that in the future that that water right has such a high value that it is more than the value of the operating ski area, that it would be severed so that the public would lose that opportunity and then we would have to deal with a resort that no longer has the capability to provide the adequate snow-making or the base facilities to support the recreating public.

So the intent is just to be able to tie the water with the use to make sure that that is going to continue in the future.

Mr. BISHOP. All right. We will have multiple rounds obviously on this question.

Mr. TIPTON. Thank you.

Mr. BISHOP. I ask unanimous consent that the gentlelady from Wyoming be allowed to join us on the dais and participate.

OK. Mr. Grijalva, questions?

Mr. GRIJALVA. Thank you, Mr. Chairman. Chief Tidwell, is it a good idea to be conducting land use planning in 2011 using the planning procedures from the Reagan Administration?

Mr. TIDWELL. We have been trying to revise and amend the 1982 regulations for close to 20 years to eliminate some of the unnecessary analysis, some of the unnecessary alternative development that is required in the 1982 rule.

Mr. GRIJALVA. So it is not a good idea?

Mr. TIDWELL. No. We need a new rule.

Mr. GRIJALVA. And how many forest plans are currently out of date and need to be revised?

Mr. TIDWELL. There are I think it is over 65 plans need to be revised. That means those are plans that have been in place for over 15 years.

Mr. GRIJALVA. And under the old rule, isn't it correct that completing a new forest plan often takes five to eight years?

Mr. TIDWELL. Yes. That has been our experience. Five to seven years, sometimes actually more than that to actually revise under the 1982 regulations.

Mr. GRIJALVA. And under the proposed rule, what would be the estimate of how long it would take?

Mr. TIDWELL. We are estimating two to four years and that over time, as we learn how to apply the new rule, we expect that we will actually be able to shorten that.

Mr. GRIJALVA. Many of the witnesses here today have and will state in their testimony that the rule will not save a lot of money. First, can you estimate what cost savings might come from a new rule and why would that lead to cost savings?

Mr. TIDWELL. We eliminate some of the unnecessary analysis that we are currently required to do, and sometimes that takes years to do the analysis, the modeling that is not necessary.

We also eliminate certain alternative development that would maximize one use at the expense of other uses that are not feasible, but it takes a lot of time to put that together. Those are a couple of the things that we no longer would be required.

When it comes to a management indicator species, we would no longer be required to develop population trends of these species, which is very time-consuming and there is a long track record of preventing us from being able to carry out projects on the national forest. This is also a concept that is not supported by science.

Mr. GRIJALVA. Chief, I think it would be helpful, because we are going to repeat this today a lot, if you would define three terms for us: one, landscape scale planning, species viability and species of conservation concern. In defining these terms, can you explain what roles these concepts play in the proposed rule?

Mr. TIDWELL. Well, landscape scale are restoration conservation. We recognize today that to restore these forests we have to look at very large areas. It is no longer OK for us to be able to look at small projects of maybe a few hundred acres to a few thousand acres. We need to look at large landscapes to really address the issues that we are seeing today with insect and disease invasives. So it is to take a look at a large enough area where we can make a change in that landscape that it will actually make a difference and increase the resiliency of forest health.

With species viability, the National Forest Management Act requires diversity. It requires us to provide for diversity of plant and animal species. The concept of viability is that in our rule, this new rule, we look at species of conservation concern. These are a limited number of species where there is scientific evidence that they are at risk of existing.

We want to then focus on those species to make sure that they remain viable, that these populations remain viable in the future so that they are not then added to the threatened or endangered list. We have taken steps to recognize that we are limited to the inherent capability of the forest to be able to provide for diversity. We made that very clear that we are limited to the inherent capability.

We also recognize that if there are things that are affecting diversity viability outside the control of the Forest Service that we would no longer be held accountable like we are under the 1982 rules. We would no longer have to deal with diversity viability on a project level that we are required currently under the 1982 rule.

Mr. BISHOP. OK. You can give that third definition on the next round here.

Mr. TIDWELL. OK.

Mr. BISHOP. Mr. McClintock?

Mr. MCCLINTOCK. Thank you, Mr. Chairman. Chief Tidwell, since the day I took office three years ago I have been inundated by complaints from forest users about policies of the National Forest Service, complaints that I have shared with you and your subordinates on many occasions, complaints that were amplified in a field hearing that this Subcommittee held in Sacramento in September.

These complaints include imposing inflated fees that are forcing the abandonment of family cabins that have been held for generations, shutting down long-established community events upon which many small and struggling mountain towns depend for tourism, expelling longstanding grazing operations on specious grounds, causing damage both to the local economy and to the Federal Government's revenues, closing long used roads, many of which are parts of county road systems essential to local residents and even obstructing county efforts to provide maintenance from local budgets to keep those roads open, obstructing the sound management of our forests, creating both severe fire dangers and chronic unemployment.

You have heard echoes of those complaints on this panel. I would like to know specifically what you have done to redress these grievances.

Mr. TIDWELL. Mr. Congressman, one of the things with the first concern you raised about the fees for our recreation residences, following the law that Congress passed to change the fee structure, there have been a lot of efforts to revise that. We have been very interested in working with Congress on that, but until Congress passes a new law we are required to follow the current law, which will result in some additional fees for some of these cabins.

On the concern with——

Mr. MCCLINTOCK. Hold on. Let me stop you right there. The law requires market rates. You assessed these at the very top of the market and haven't reassessed them since, which invites the question if you were charging market rates, then why aren't these cabin sites and grazing lands being released out if that is the market rate? You have priced them far above the market rates. They are not being released. That ought to be a screaming warning that you were charging well above market rates for these cabins and for these grazing rights.

Mr. TIDWELL. Well, the CUFFA Act requires that we do appraisals every 10 years, and that is as often as we can do appraisals. We don't make any adjustments up or down during that 10-year period. You know, currently the rates have not increased except at a very small rate because of Congress taking the action at least in the past Congress to give us a direction to not go forward with CUFFA and so those rates have not gone up yet.

Mr. MCCLINTOCK. Again, my question is what specifically have you done to redress these grievances? So far I have heard absolutely nothing.

Mr. TIDWELL. Well, we continue to work with the rec residents' homeowners associations. We continue to work with Congress to try to find a solution to the existing——

Mr. MCCLINTOCK. That is gobbledygook. What specific actions have you taken?

Mr. TIDWELL. The actions that we are taking is that we are continuing to work with Congress and work with the Association on different options——

Mr. MCCLINTOCK. That is not an answer.

Mr. TIDWELL.—that entail Congress.

Mr. MCCLINTOCK. With all due respect, Chief, that is not an answer to the question.

Let me go to the forest users if I may. Dr. Stewart mentioned Gifford Pinchot. Between 1910 and 1915, he did a series of lectures at Yale University in which he propounded maxims for "the behavior of foresters in public office." Among them, a public official is there to serve the public and not run them. Public support of Acts affecting public rights is absolutely required. It is more trouble to consult the public than to ignore them, but that is what you are hired for.

I would like to ask the forest users how well they believe the Forest Service is meeting these maxims of Gifford Pinchot.

Mr. BISHOP. Is that to Dr. Stewart?

Mr. MCCLINTOCK. I will start with Ms. Soulen-Hinson.

Mr. BISHOP. And you have 17 seconds to do it.

Ms. SOULEN-HINSON. Seventeen seconds. That is fast. How responsive is the Forest System? You know, the Forest System, I do believe they need a new planning rule, but I don't think this is the right planning rule. It makes it more complex. They are tied up in litigation. They can't address our needs, and it is a real problem.

Mr. BISHOP. All right. Thank you. Like I say, there will probably be more than one round of this.

Representative Holt?

Mr. HOLT. Thank you, Mr. Chairman. First, Chief Tidwell, I wanted to give you a chance to say more if you choose to about the definition of species of conservation concern. You touched on it, but I think you were not able to finish your thoughts.

And then I wanted to ask a question about the travel management or a couple of questions about that, but did you want to say more about the species of conservation concern?

Mr. TIDWELL. On species of conservation concern, we have limited any viability requirements in our proposed rule to these species of conservation concern. It will be a limited number of species where there has to be scientific evidence that indicates that they are at risk. Not just any species can be put forward.

We also have put language in the rule to make very clear that we will not be counting these species, but we will use ecological conditions to ensure that we are providing for the viability of these species to ensure that they are not going to be added to the endangered or threatened list.

Mr. HOLT. So, in a word, are you narrowing or broadening the current rule?

Mr. TIDWELL. We are narrowing the current rule.

Mr. HOLT. OK. Thank you.

Mr. TIDWELL. The current rule narrows.

Mr. HOLT. Yes. Thanks. Could you explain? Let me get three questions out here for you, and you can assign your time appropriately then.

Could you explain how travel management can serve to save the Forest Service money, and could you explain more about travel management, how it gives or how it might give flexibility to allow for such things as big game retrieval or protecting commercial activities by reducing user conflicts?

And then more generally about this whole rule, the proposed planning rule, do you expect it will serve to help clarify the multiple use mandate and will it serve to remove the inherent tension or lessen the inherent tension in this multiple use mandate?

Mr. TIDWELL. The first one with travel management, the intent of that rule was two things: to ensure that there would be motorized opportunities for the recreating public to access and enjoy and, second, to reduce the resource impacts that were occurring primarily from cross-country travel. And then the third part of it is to identify a road system that is going to be necessary for us to be able to maintain and provide for in the future.

We have more roads. The 373,000 miles of roads, that is more roads than we currently need to be able to manage or that the public needs to access, or that we can afford to continue to maintain. When we have soil erosions coming off of those roads it impacts the water quality. In some cases, it makes it much more difficult for us to be able to do timber harvest activities, to do the restoration work on the national forests.

As far as with the user concerns, there are provisions that allow the local unit when they go through the travel planning to look at what is necessary at the local level, to provide for access for game retrieval for instance. There is a lot of flexibility that is built in that is done at a local level, at that forest level.

And then with the planning rule, our intent is to make it very clear that multiple use is essential. It is one of our mandates. We are required to follow that, and it is important. The challenge of course is always to find the balance.

So we believe that this rule does a much better job to recognize and require components to address the various different uses under the Multiple Use Sustained Yield Act and do it in a way that we can move forward with the restoration of our forests so they will continue to provide that full range of benefits that we all rely on.

Mr. HOLT. We are constantly aware of the tension that is created by this multiple use mandate, and I hope that this plan that you are proposing, process that you are proposing, will help us kind of lessen that tension or have a method for resolving it. Well, thank you.

I just wanted to comment, since maybe you intended to say this, that the Forest Service has many times, probably six or eight times, the mileage of the Federal Highway System, and we can't possibly expect you to manage, maintain that kind of road system I think. Thank you.

Mr. BISHOP. Thank you. The gentleman from Idaho is recognized.

Mr. LABRADOR. Thank you, Mr. Chairman. Margaret, can you explain, in your opinion, where do you think the authority for this new rule comes from? Specifically what statute do you believe the

Forest Service derives the authority to manage wildlife for viable populations?

Ms. SOULEN-HINSON. Congressman Labrador, Chairman Bishop, Subcommittee Members, I have a great concern here with what is going on when it comes to the issue of viability.

While the Chief states that viability won't apply to every species or every project, it is something that they have in a plan component, and plan components must apply. Every project and activity must comply with the plan components, and viability of species is one of the plan components.

Plus I don't think there is any—the criteria, anyone can or a managing regional forester can name a species to the list of species of conservation concern. I don't see how this is narrowing those species that will be considered for viability when it goes from vertebrate species under the current rule to all species, fungus, moss and everything else. I just see it opening up and broadening that and requiring more and more analysis, so I think it is a horrible problem.

Mr. LABRADOR. OK. Thank you. Now sometimes in Congress we just talk about rules and regulations and we forget about the real effects, the real life effects. Can you explain to us again what is going to be the real life effect to you, to your family, to your industry?

Ms. SOULEN-HINSON. Certainly. Right now our industry, because of the viability issue over the big horn sheep population, our industry, my family, we are going to lose 60 percent of our domestic sheep operation.

Now we live in a small, rural community, 5,000 people, two stoplights in the whole county. We employ about 18 people. We shop locally. We buy everything locally. This in essence will eliminate our domestic sheep operation, and it has already put two operators out of business and is severely limiting another.

Now, over the National Forest System land, about 23 percent, almost a quarter, of our industry will be impacted by the viability issue over big horns, and that is across our entire industry. Just think what happens. Twenty-three percent of the industry. That means not just the sheep producers themselves. That is the packers, the feeders, the woolen mills, the processors, the textile industry. We just had Faribault Woolen Mill just reopen in Minnesota, and a number of jobs have come back on line there. This will have tremendous impacts on us.

So, when the Forest Service says that they are redoing their planning rule, and I do think they have to redo their planning rule because it is ridiculous, but this isn't right. We are severely impacting our rural communities across the West with what goes on on our National Forest System lands.

Mr. LABRADOR. Do you have an estimate how many jobs are going to be lost?

Ms. SOULEN-HINSON. We did a study, the American Sheep Industry did and, for every thousand head of sheep, it translates into 18 jobs, so effectively on the Payette National Forest it is going to eliminate about 12,000 head of sheep. And if you take that across the West, it translates into a lot of jobs.

Mr. LABRADOR. All right.

Ms. SOULEN-HINSON. I think we estimated 50,000.

Mr. LABRADOR. All right. Thank you. Chief Tidwell, where in the statute does the Forest Service derive the authority to manage wildlife for viable populations?

Mr. TIDWELL. It is under the National Forest Management Act. It requires us to provide for the diversity of plant and animals.

Mr. LABRADOR. Isn't wildlife already managed by the states and in some cases by Fish and Wildlife?

Mr. TIDWELL. Yes, but under the National Forest Management Act we are required.

The thing that we are changing with this rule is we want to focus on providing the habitat, the ecological conditions to support the wildlife, the animals and the plants, versus to take the focus under the 1982 rule that is more species by species, counting species, tracking population trends. We believe if we provide the ecological conditions, the habitat, we will provide for the diversity in almost 95 percent of the cases.

There are some situations where we have to do a little bit more. I will use an example of a goshawk. For instance, we can provide, say, a healthy ponderosa pine stand that provides habitat for goshawks. We may also then have to take a look at that and provide a few more snags. That is what we are talking about to provide for wildlife diversity for viability. We want to be able to measure, monitor the habitat, then that is how we are going to provide for diversity. That is a significant change from what we are held to currently in the 1982 rule, and that is what our focus is going to be on.

Mr. LABRADOR. But when your goal is to eliminate unnecessary analysis and burdens——

Mr. BISHOP. All right. Let me interrupt here.

Mr. LABRADOR. I am sorry.

Mr. BISHOP. Yes. We will come back to another round.

Mr. LABRADOR. OK.

Mr. BISHOP. Mr. Broun?

Dr. BROUN. Thank you, Mr. Chairman. Chief Tidwell, I have two national forests in my congressional district in Georgia. I was just out in Montana, and access is a huge issue.

Dr. Benishek, who is a Member of this Committee, has a bill that would require more opening of access to recreation areas in the national forest, and I myself as a trout fisherman and as a big game hunter have run into a lot of roadblocks. In fact, just this last week I wanted to get into some areas of the national forest where I couldn't because there were gates over hundreds and thousands of acres of national forest land that would not allow motorized access.

Mr. Mumm talked about that in his testimony, and it is of grave concern to me about how limited access there is in the national forest for these so-called multiple uses. Hunting plays an unquestionably significant role in recreation and wildlife management and conservation throughout our national forest.

The hunting industry and in particular the hunting guides and outfitters depend heavily on the revenues generated from the business of guiding hunters on national forest lands. When access is a problem, then that hurts the outfitting business. It hurts everybody who sells groceries, motels, et cetera. The income from hunting

supports local economies and fuels wildlife and habitat conservation.

Despite these facts, the word hunting only appears just once in your draft planning rules with the context of habitat management. In fact, I have a bill that would require hunting to be a consideration in all wildlife management on Federal properties, and I hope that bill is passed into law because I think it is extremely important just for the conservation of wildlife for hunting and fishing to be considered as part of their management plan.

Why is such an important activity given only a negligible mention and offered little in the way of express protections in a document that will guide management for every single land unit in the National Forest System for the foreseeable future? Why have you all not focused upon hunting and fishing and the management of that in your proposed rules? It is unfathomable to me.

Mr. TIDWELL. Mr. Congressman, I share your concern and interest with recreation activities' access. In fact, there are 171 million people that visit the national forests every year. It creates incredible economic activity. It provides over 240,000 jobs. It provides over $14 billion of economic activity, and hunting and fishing is a big part of that.

We want to make sure we are providing access, and that is part of why we are going through the Travel Management Rule to ensure that we will be able to provide that in the future. Already through that process we have added over 12,000 miles of motorized trails to this extensive system.

Your concern about the language in the draft, the proposed rule, we heard that comment. One of the advantages that I have over the panel today is that I have had a team looking at those 300,000 comments and we have had numerous discussions, so we are factoring those comments, things that we heard on the proposed rule into the final rule.

So, we heard that concern from a lot of folks and we want to make sure that——

Dr. BROUN. Chief, let me interrupt you because my time is fixing to run out.

We have seen in Georgia a problem with human use and water management with the core lakes being not in the management plan, and we have seen water resources ruled to not be utilizable by human beings in Atlanta, Georgia, in Gwinnett County, which I am fixing to represent part of that county in my new district hopefully if I am reelected.

I think it is absolutely critical that you put hunting and fishing in the forefront of any rule that is put forward. Whether we need a new rule or not, obviously that could be debatable, but if you don't include specifically hunting and fishing and access to those public properties that every taxpayer in this land owns, then you are neglecting a tremendous opportunity to make sure that those activities continue forward, and I think neglecting to do so is going to shut that off in the future.

Mr. Chairman, my time has expired. I yield back.

Mr. BISHOP. Thank you. The gentlelady from South Dakota is recognized.

Mrs. NOEM. Thank you, Mr. Chairman. I appreciate that.

Chief Tidwell, I have a question. I want to follow up a little bit on what Representative Labrador was talking about because the National Forest Management Act does not mention viable populations. Instead, this is what the Act says. It requires the Forest Service to provide for diversity of plant and animal communities based on the suitability and capability of the specific land, which you mentioned.

But I think you forgot the second half of what that sentence says. The second half of that sentence says that based on the suitability and capability of the specific land area in order to meet overall multiple use objectives and within the multiple use objectives of the land management plan.

That is what my concern is. I am very concerned about the viability requirement because that was the basis for Chief Dombeck's remand of the Black Hills National Forest plan revision in 1999, and that remand required an additional six years to complete two forest plan amendments. Even two weeks ago several environmental special interest groups filed a lawsuit again challenging the management of the Black Hills National Forest in my state with species viability as their primary claim.

Now again, species viability is not required by the National Forest Management Act, so I want to know why doesn't the Forest Service use the revision of the planning regulation as an opportunity to eliminate all the opportunities for appeals and litigation that are cumbersome and is weighing down the whole process?

Mr. TIDWELL. We are using this opportunity with this planning rule to clarify and make it very clear where we are going to focus on diversity through providing ecological conditions, and with this very limited number of species of conservation concern we will continue to look at viability through providing ecological conditions to ensure that those species are not listed.

Mrs. NOEM. Well, let me interrupt for a second because the proposed rule mandates things such as species viability and aquatic ecosystem restoration and maintenance, but it gives no requirements, no requirements whatsoever, to implement other multiple uses such as grazing, timber management, any of those. So I am very concerned about this because the U.S. Court of Appeals for the Seventh Circuit concluded that the U.S. Forest Service does not have the discretion to ignore—does not have the discretion to ignore—multiple use mandates that focus solely on environmental and recreational resources.

Mr. TIDWELL. We have made sure that in our proposed rule that we do make it very clear on the importance of multiple use and to make sure that multiple use objectives are considered throughout all parts of the rule.

It is something we wanted to make sure that that was very clear, and I am taking lengths and steps to make sure that that is a key part of this rule and it is right that it will be up near the front of the rule.

Mrs. NOEM. Well, tell me. Maybe you covered this earlier, but what is your definition of a viable population?

Mr. TIDWELL. A viable population is a population of a species that will continue to exist, not necessarily on any one piece of land, but be able to continue to exist. That is one of the things that the

changes that we made, currently under the 1982 provisions we are required to not only care for that species whether it even exists on the national forest or if it could exist there or for actions that occurred off the national forest.

We have made some significant changes to be able to focus on providing the ecological conditions, the habitat to be able to support these species, and under this very limited category of species of conservation concern we still point out that it has to be within the inherent capability of that land base—it is not at the project level—and it has to be within the authority of the Forest Service.

Mrs. NOEM. Well, let me give you a specific example that we are facing in South Dakota. Last summer, three brand-new species of spiders were found and discovered on the Fort Pierre National Grasslands in South Dakota. Nobody knows very much about these spiders because we haven't seen them before, and they are very hard to study because they are less than one millimeter in size.

But I am concerned that the Forest Service is opening the door for these types of species to be identified as species of conservation concern, which would make forest planning more difficult. It would make it more expensive and time-consuming for the Fort Pierre National Grasslands, and it could potentially undermine all the grazing programs that currently happen there. So do you understand my concern with the direction that you are going with the rule?

Mr. TIDWELL. I share your concern, and that is why we have taken the steps in our plan to ensure that that will not happen.

We use the example of those spiders. When it comes to species of conservation concern, there has to be clear scientific evidence, one, that they exist and, second, that they are at risk. So it can't just be another species or another list or things that we have had to deal with under survey and manage, for instance, to go out and collect information about species that we don't even know if they exist or not.

Mrs. NOEM. But the risk still remains.

Mr. TIDWELL. I am confident with the changes that we are making from our proposed rule to final will make that very clear about what we will be responsible to do and what we will not be responsible to carry out.

Mr. BISHOP. All right. Thank you.

Mrs. NOEM. Thank you for coming. Thank you, Mr. Chairman.

Mr. BISHOP. I am sure we will follow up on that point as well.

Mr. Amodei, welcome to our Committee.

Mr. AMODEI. Thank you for allowing guests to be here today, Mr. Chairman. I appreciate it on the 60-day anniversary of my being sworn into this organization.

Mr. BISHOP. Is there a cake?

Mr. AMODEI. Actually I thought we would wait until day 61 to commit to something like that.

Mr. BISHOP. All right.

Mr. AMODEI. Thank you for asking though.

Chief, my questions revolve around your travel management plan testimony and with specificity, and I think it is fair since one of the folks on the second panel is the chairman of the Elko County

Commission, it is with respect to the Humboldt-Toiyabe National Forest, so I want to kind of focus that a little bit if I might.

Could you describe the objective of your process in coming up with a travel management plan in this instance for a national forest, HT?

Mr. TIDWELL. The purpose of travel management planning is to ensure that we provide motorized recreational access and access to management of the national forests and at the same time to address resource impacts that occur from situations primarily from cross-country travel or in some cases of some unmaintained, nonmaintained roads and trails.

The purpose is to make sure that we can continue to provide a system of roads and trails and that the recreating public not only has that today, but they will have that in the future. That is the purpose of the travel management rule.

Mr. AMODEI. OK. And who does that? Is that something that is done at the forest level?

Mr. TIDWELL. Yes. They are done at the forest level through extensive public engagement, visiting, working with local communities to understand what they want, where they want access, where they need access, along with the needs for resource management of the national forest.

And so it is built on all that public comment, actually what is sustainable, and it is something that we can continue to manage in the future. Those are the things that are factored into the decision.

Mr. AMODEI. And describe for me the type of person at the local level who would head up that effort when doing a travel management plan. What are their qualifications? What is their education? What is their title generally if you know?

Mr. TIDWELL. It would depend on different forests. It could be the planning staff. It could be the district ranger. It is the forest supervisor that will actually be making the decision. These are people that have experience dealing not only with resource management but also with dealing with the public to be able to make sure.

We are providing opportunities where the public is heard, and we are factoring their concerns and comments into this system of roads and trails.

Mr. AMODEI. OK. Is there any economic analysis in this procedure? To your knowledge, has there been any economic analysis in the Humboldt-Toiyabe instance?

Mr. TIDWELL. When it comes to just identifying the motorized vehicle use map, that is to identify the current system of routes and trails that are open for the recreating public. It depends on if they are looking at additional trails to add to that. They have to then deal with the economics.

We often look at what is the current cost of being able to maintain this system. In Subpart A of the rule where we actually look at just the road system—not the trails but just the roads—we do need to look at the economics. What is going to be the cost of being able to maintain this road system? That needs to be factored.

Mr. AMODEI. Perhaps I didn't make myself clear, Chief. Any economic analysis in terms of the community or in the instance of the

Humboldt-Toiyabe? And for purposes of the second panel, is there any local economic analysis?

When you talk about this collaborative, open, transparent process, I assume that that means you talk with the local planning authorities, which in the instance of the Humboldt-Toiyabe is the county commission, who is the ultimate statewide and local land use planning folks.

Is there any economic analysis to your knowledge of what that does in the community when you make your decisions regarding travel management plans in the Humboldt-Toiyabe? Not the cost to maintain roads. What it is going to do in Elko, what it is going to do in Carlin, what it is going to do in other towns and cities affected.

Mr. TIDWELL. We need to consider what those consequences are. That is often what drives why we keep this road open versus this other road if it not only accesses for recreation but say it has access for a mine or it is necessary for grazing. Those are the things that factor into those decisions.

So, we do look at the economic consequences of our decisions to determine which roads need to stay open. Where do we need additional roads? Which are some roads we no longer need on the system that they are not providing for economic activity? Those are the things that we factor in.

Mr. AMODEI. And if that is not factored in, would you then think that that analysis needs to be revisited?

Mr. TIDWELL. It does need to be considered. And so, if there are decisions that they are making that shuts down a grazing operation or it shuts down a mine, for instance, which I can't imagine that ever occurring, yes, that would need to be reviewed.

Mr. AMODEI. And, final for this round, how about recreation impacts? If it adversely affects recreation impacts, should that be considered also in the travel management plan?

Mr. TIDWELL. Well, you have to look at the full mix of recreational activities, not only the motorized activities but also the nonmotorized, and then you have to look at what is the necessary system that it will be able to provide for recreational access but at the same time to also deal with resource impacts, deal with impacts to wildlife, impacts to hunting experiences. We have to look at the full mix when we make those decisions.

Mr. BISHOP. All right.

Mr. AMODEI. And I understand my time is gone. So I assume that is a yes, it needs to be part of the mix when you say full mix?

Mr. TIDWELL. Yes.

Mr. AMODEI. Thank you. Thank you, Mr. Chairman.

Mr. BISHOP. Thank you. The gentlelady from Wyoming? Welcome home first of all. Do you have questions?

Mrs. LUMMIS. Thank you, Mr. Chairman, and I want to thank the Chairman's indulgence and the Committee's indulgence of my attendance at this hearing as a former Member of the Committee. It is nice to be home.

A question for the Chief. Could the Forest Service designate a species removed from the Endangered Species Act as a species of conservation concern under your rules?

Mr. TIDWELL. I am trying to think. If it is a species that has been removed from that list, it would indicate that it has been recovered and that there would no longer be a concern about that species. So I am not saying it couldn't occur, but I can't imagine why it would.

Mrs. LUMMIS. It might be helpful to clarify that for the comfort level of those of us who see ongoing litigation of species that have been removed. What about a species designated as warranted but precluded?

Mr. TIDWELL. If that is a species where there is evidence that it is at risk, it would be a species that could be added onto the list to ensure that we are providing the habitat, the ecological conditions to provide for that species, yes.

Mrs. LUMMIS. So the Forest Service would not necessarily take its guidance from the ESA and the U.S. Fish and Wildlife Service? It might act independently?

Mr. TIDWELL. Yes, based on scientific evidence that there are certain very few, limited species that would be at risk with the intent to prevent these species where there is information that they are at risk, to prevent them from being listed. That is the purpose of this concept of species of conservation concern is to be able to maintain these species so they are not listed so that you don't have to deal with that.

Mrs. LUMMIS. Are there not tools under the ESA and U.S. Fish and Wildlife Service itself that provides for conservation and habitat management plans for threatened but nonlisted species or prior to the threatened status being placed on that specie?

Mr. TIDWELL. Yes. And we will continue of course to work with Fish and Wildlife Service, but we have species of, for instance, you could have, for instance, the goshawk is another good example that is in your state that it is a species of conservation concern, but by providing the ecological conditions, the habitat, we are taking care of that. That is the purpose of this is to get away from counting species but to concentrate, focus on the habitat. If we provide that habitat, then we provide for the viability. We provide for the diversity. That is the concept that is behind our rule.

Mrs. LUMMIS. Thank you, Mr. Chairman. That gives me less a comfort level than when I began my questioning, but I appreciate very much, Chief, your response and I yield back. Thank you, Mr. Chairman.

Mr. BISHOP. Thank you. Let me take an opportunity to ask a couple of questions. Once again, I think the last statement of the gentlelady from Wyoming is significant here. There is a lack of comfort level in what we are talking about here.

And if I could carry on what Mr. Broun and what Ms. Noem said to you, I appreciate you telling us that multiple use is the requirement for which you look at this job, and the Seventh Circuit Court was specific in telling you that you have to manage for multiple use here despite what this rule actually says. So, Ms. Hinson, can I ask you how many times the word grazing appears in this entire rule?

Ms. SOULEN-HINSON. Once. We are right there with hunting. Once.

Mr. BISHOP. And when you were talking about a whole lot of new terms in there that are not definable in law nor are they definable in logic, does it give you, Ms. Hinson, a great deal of—I mean,

based on that, how do you think grazing is going to fare in the planning process or the planning purposes under this particular rule?

Ms. SOULEN-HINSON. We will not fare well. I think there is tremendous emphasis on conservation of species versus multiple use and, as has been repeated here by a number on the Committee, multiple use is a mandate. It has been held up within court. That is what is in statute. There is no provision in statute for viability of species, and certainly the states have the statutory authority for managing species unless it is through U.S. Fish and Wildlife Service where it has been an endangered species.

Mr. BISHOP. Thank you. So, Mr. Horngren, let me go back to your experience, especially in litigation. Can you compare your experience with survey and management under the Northwest Forest Plan to what you see under the species requirement proposed by this particular rule?

Mr. HORNGREN. Yes, Mr. Chairman. The survey and manage program was part of the Northwest Forest Plan and did extend to the mollusks and the lichens. It cost millions of dollars, two years of surveys sometimes to get a project. The red tree vole, who was one of these special species, had little five-acre preserves around it wherever it was found, and it had 20 nests in a project area, so it looked like a shotgun after they were done applying it.

Just real briefly on the species of conservation concern, I cannot understand how the Forest Service is imposing a legal obligation on itself to preserve species at risk that it admits is at risk. And in this case, I would like to submit for the record the species of conservation concern list for Missouri that is 25 pages long. Pity the Mark Twain National Forest.

[NOTE: The Missouri Species of Conservation Concern List has been retained in the Committee's official files.]

Mrs. HORNGREN. Last, as Congressman McClintock said, the rule as it is currently written is a bunch of gobbledygook. It does not mention the word habitat once. Make it simple for the courts. Make it simple for the planners. It mentions population three times. I think they are going to have to be crawling around on their hands and knees looking for them.

Mr. BISHOP. I may come back for some other questions for you as well.

Chief Tidwell, define spiritual sustenance that you have in Section 219. You have to manage for it. What is it?

Mr. TIDWELL. Spiritual subsistence?

Mr. BISHOP. Sustenance.

Mr. TIDWELL. Sustenance. It would be for us to consider things that are important to the public, to Native communities, to be able to factor that into our decisions.

Mr. BISHOP. It is not a legal term somewhere?

Mr. TIDWELL. Not that I am aware of.

Mr. BISHOP. What about cultural sustenance? Is that a legal term somewhere?

Mr. TIDWELL. No, but the importance there is to be aware of these concerns that are presented by our publics, to be able to address those when we are making decisions.

Mr. BISHOP. Chief, what Representative Lummis, and I wish she was still here, was talking to you about is a great deal of concern as to these definitions, which have no legal title but for which you must manage and come up with it.

So, for example, when you were talking to Mr. Labrador it was not quite an accurate statement. You have the authority to manage for habitat but not for specific species, so you didn't give him quite the exact answer that he was asking in that particular question.

You told us on this species of conservation concern that it would be based on scientific evidence of risk, but if you read the document, the word science isn't there. There is no basis for scientific—you haven't done that.

If indeed that is what the Department and the Forest Service want it to be, you should say that specifically in the rule. You have not said that in the rule, which is why before you actually implement these things you need to go back and if indeed you want some kind of scientific data the rule should specify that. If you want some kind of spiritual sustenance, you should actually say what that means. And you haven't done it. The Forest Service hasn't done it, and that has not given us any kind of predictability or feeling of comfort in where you are going in this particular area.

I just went over, but there is another turn. So, Mr. Grijalva, you get a chance to mellow me out.

Mr. GRIJALVA. Thank you. Quite frankly, I feel spiritually and culturally isolated at this point.

[Laughter.]

Mr. GRIJALVA. But, Mr. Tidwell, some of the other witnesses have been critical of the decision to use best available science in the forest planning. Explain the provision in the proposed rule, and is this a correct standard?

Mr. TIDWELL. The provision, the intent, is that we will use best available science. We want to use science. It has to be relevant. It has to be available. It has to be accurate. We have taken steps to make sure that we are now defining the best available science and not allowing someone else to define that.

The courts' decisions have made it clear that, yes, we need to use science and we need to document it. That is the other key part of this is that we will be required to document that. In the past that is where we have run into trouble is when we have failed to document how we have used this science. That is when we have often been challenged and we have lost.

We have taken steps to just make that very clear that this will be the science that we need to use along with a lot of other things to factor into our decisions.

Mr. GRIJALVA. And again, Chief, the proposed planning rule, how does it improve the amount, because we have heard that from my colleagues, the amount of local community, the stakeholder involvement in this planning process?

Mr. TIDWELL. It goes back to the——

Mr. GRIJALVA. That has been a criticism of the old rule.

Mr. TIDWELL. Yes. The new rule will require collaboration, much more public involvement at all parts of the rules, whether used with the assessment through revision and then also even with the monitoring part, to make sure that we are factoring in what the

communities, what the public want as far as this balance, this mix of multiple use.

I cannot stress the importance of collaboration. Throughout the country where we have models of collaboration, the difference that you see is we are implementing work on the ground, people are working together, and we are able to move forward to restore our national forests.

Mr. GRIJALVA. And there was 300,000 comments on the draft rule. As a consequence of those comments, you anticipate changes in the final product?

Mr. TIDWELL. Yes. Yes. There will be numerous changes, I will say improvements, clarification and just changes based on those comments. And many of those things have been raised by Members today that we heard during the public comment period, and we are taking steps to address those concerns.

Mr. GRIJALVA. And I am glad for the point because multiple means multiple. We keep talking about that sort of conservation or even cultural and spiritual sustenance. Are they going to be part of the multi-use and increased definition to that that was brought up by the Chairman?

Mr. TIDWELL. Well, the answer is yes.

Mr. GRIJALVA. OK. And I think the last ones talk a little bit about economic opportunities for surrounding communities. Talk about the proposed rules and if it provides job growth for those communities and what would be the opportunities for job growth. I know it is hard to quantify.

Mr. TIDWELL. Well, the proposed rule makes sure that we consider the needs for the economic activity, to sustain the economic activity. Where those jobs will come from is not only the recreational activities that will continue to expand on the national forests but also from the restoration work.

The proposed rule is very clear that we need to address the need for restoration, to use the timber harvest, the active timber management, to be able to do this restoration. From the information that I have, that is one of the best job creators for a million dollars invested creates as many or more jobs than about anything else that we do in this country.

Mr. GRIJALVA. Thank you. Ms. Hinson, just for my clarification if I may, and thank you for your testimony.

Ms. SOULEN-HINSON. Yes, sir.

Mr. GRIJALVA. The 60 percent loss for your operation and the 23 percent loss overall, that is tied to the existing rule or to the proposed rule? Where does that percentage——

Ms. SOULEN-HINSON. It is tied to the existing rule with the viability regulation, but the new rule expands the viability regulation as far as I can see.

Mr. GRIJALVA. Well, the testimony was that it narrowed it, so we are not getting valid truth from the person that said it was narrowing it.

Ms. SOULEN-HINSON. Right. I think Chief Tidwell and I probably have a little disagreement on how it narrows it.

I find it difficult to see how viability is narrowed when you expand it from vertebrate species to all species: invertebrates,

mosses, plants, on and on and on, funguses. That does not narrow the species that can be considered for viability.

Mr. GRIJALVA. And I know environmentalists think it is too narrow. I yield back.

Mr. BISHOP. Too narrow? Representative Tipton, do you have other questions?

Mr. TIPTON. Thank you, Mr. Chairman. And if I may take just a couple of minutes? Chief Tidwell, for the State of Colorado water is our lifeblood, as I know you recognize. It seems to me that the proposed rule that you have put forward is in direct conflict with Colorado water law, congressional intent and private property rights.

Just a few moments ago when you were answering one of my questions you said that you wanted to be able to see the resources tied to the land, that there had never been an example to where private ownership of water had been sold off for another use.

Can you demonstrate for me in the proposed rule the guarantee for a ranching community that that water is going to be used for grazing, that that water is going to be used to make snow in the hills for our hospitality industry?

Mr. TIDWELL. The planning rule provides components to make sure that we address those multiple use activities to be able to provide that balance of mixes. When it comes to dealing with water rights, the planning rule doesn't specifically get into the issue of water rights. Those are dealt with through our terms and conditions of permits that authorize the use of land.

Mr. TIPTON. Authorizes the use but does not guarantee the use, so that gives the Forest Service, as we are going through the variety of other concerns that have been expressed here, the Forest Service could make a determination that that water could be used for something other than snow-making or other than grazing, is that correct?

Mr. TIDWELL. Well, with snow-making, it is my understanding the clause is specific that if that water is used for snow-making that it is going to continue to be tied to that use.

Mr. TIPTON. And that is in the clause?

Mr. TIDWELL. It is my understanding that it is.

Mr. TIPTON. Can we get that from your office?

Mr. TIDWELL. Yes, sir.

Mr. TIPTON. I would like to have a followup on that to be able to see that guarantee.

Also, it is my understanding that this rule is just now being applied to Region 2. Is that correct?

Mr. TIDWELL. No. The interim clause would apply to all ski areas.

Mr. TIPTON. To all ski areas across the country?

Mr. TIDWELL. Across the country.

Mr. TIPTON. How about the grazing end of it, water use for grazing?

Mr. TIDWELL. This clause that we are referring to is for ski area permits only.

Mr. TIPTON. Just for the ski area permits only. OK. Mr. Chairman, thank you.

Mr. BISHOP. Mr. McClintock, do you have other questions?

Mr. MCCLINTOCK. I do. Thank you. Let me first dovetail onto Mr. Tipton's line of questioning of Chief Tidwell. He is concerned about the Forest Service preempting of local or state water laws.

In California, we seem to have the opposite problem. We seem to have a situation where the Forest Service has been surrendering management authority of national forest lands to the State of California, specifically to the State Water Resources Control Board, despite the fact the state has no official jurisdiction.

We have a situation with the Red Ink Maid Mine, a longstanding mining operation who attempted to renew its permits and for the first time the Forest Service says no, first you have to go to the State Water Resources Control Board, which is extremely restrictive and has no jurisdiction in the forest.

Are we seeing a pattern of the Forest Service simply playing both sides of the field wherever it can find an excuse to expel operations? Is that why we have this inconsistency in approach?

Mr. TIDWELL. Our approach is to work with state agencies, coordinate, share information so that they are able to complete their process.

Mr. MCCLINTOCK. This isn't coordinating. This is deferring to them despite the fact that they have no jurisdiction in the matter.

Mr. TIDWELL. Well, I am not familiar that we are deferring. In fact, we are not deferring a decision, but we will work with them to provide the information so they can carry out their——

Mr. MCCLINTOCK. As I understand it, the Forest Service denied a reauthorization of the permit for the Red Ink Maid Mine until it gets permission from the State Water Resources Control Board, despite the fact that this is an operation that has been going on for many years.

Mr. TIDWELL. Well, permits need to comply not only with Federal law, but they also need to comply with state law. That is my understanding. We are not in a position. We can authorize an activity, but if it is in violation of a state law, they still need to comply with the state law.

Mr. MCCLINTOCK. The management agency agreement between the United States Forest Service and State Water Resources Control Board in 1981 I believe provided the Forest Service was the management agency for all activities on National Forest Service lands.

Mr. TIDWELL. Yes.

Mr. MCCLINTOCK. All right.

Mr. TIDWELL. But if an activity also has——

Mr. MCCLINTOCK. So you are doing it both ways then depending upon how—let me ask the forest users because this is the crux of the matter.

Are we watching with the current administration of the Forest Service an abandonment, indeed a repudiation, of Gifford Pinchot's vision of managing the forests to achieve the greatest good for the greatest number in the long run, his words? Are we watching an effort to expel the public from the public's lands?

Does anyone want to jump in on that among the forest users? Mr. Mumm perhaps?

Ms. SOULEN-HINSON. We are certainly being expelled.

Mr. MCCLINTOCK. Mr. Mumm?

Mr. MUMM. Well, I have to be very careful in how I approach this, but I guess in terms of, for example, the Travel Management Rule when you are looking at a reduction in ability or opportunity to go recreate on forests, on many forests that is 50 to 80 percent reduction at the end of a process, then yes, I think we are suffering from that.

Mr. MCCLINTOCK. One of the claims they have made is it is for budget reasons, but then we find that counties are saying fine, we will step in and provide maintenance ourselves because these are vital to our county road systems and they are being forbidden by the National Forest Service.

This seems to evince a pattern that dates back to medieval times when the king set aside one-third of the entire land area of Southern England as the king's forest. They expelled the public, and the forest became the exclusive preserve of the king as foresters and the favored aristocrats.

It seems to me that we are slowly inching back toward those bad old days that the Magna Carta redressed with no less than five clauses it was so irritating to the public then. Again, are we watching this trend unfold?

Mr. MUMM. There is a point in the new proposed rule, and I have heard to the contrary to that today. This rule emphasizes preservation over multiple use. There cannot be a doubt over that. Right from the outset it defines a binding requirement for ecological sustainability and only the requirement that the forest plans contribute to social and economic sustainability.

What you are talking about are communities that grew up before the Forest Service was ever there dependent on the resources that they are adjacent to. When ecological trumps the social and those economic values, you have gone beyond the mandates that Congress set for them.

Mr. BISHOP. Thank you. Mr. Broun, do you have other questions for this panel?

Dr. BROUN. I do, Mr. Chairman.

Chief Tidwell, you talked about the science of species. We have seen over and over again here with the Endangered Species Act and other Federal law that science is not sometimes true science.

I am on the Science, Space and Technology Committee, and we have had hearings about various rulemaking and the science or lack thereof by EPA and other Federal agencies. We saw recently where Secretary Kempthorne signed into law a listing of the polar bear. He utilized a prospect of human-induced global warming and loss of habitat when actually polar bears are expanding all over their range except for in just one or two possible population centers, where in actuality the polar bear is not endangered.

We have seen in my state as well as other states that I have been associated with where actually the Endangered Species Act harms the proper conservation of species, and in fact out West prior to the wolf being delisted I know in a lot of communities the management tool by the local population was described as a 3S management program: shoot, shovel and shut up.

I know in my own state where we have pileated woodpeckers where forest owners will not allow the management from a scientific basis because it could close their whole development of their

forestry resources that they depend on their livelihood for those resources. So science is not clear-cut.

I am a medical doctor. When I went to medical school I was taught things to be absolutely true scientifically, and five years later we were being taught exactly the opposite. I say all these things to bring out the idea for you to utilize because I am very concerned and I have no comfort, frankly, in your proposed rulemaking, particularly as a hunter, as a fisherman and as an Arctic conservationist that your proposed rule is going to actually be good for the species.

And then when you are expanding the purview of species management and you are talking about science being utilized in trying to make those management decisions, I think you are opening a can of worms that is going to be actually just like Mr. Mumm said. It is going to be a protectionist policy that we are going to go forward.

I think we are going to see more and more lawsuits being generated because of this proposed rule. I think we are going to see these new definitions that have no legal backbone or definition to them of spiritual or cultural considerations. I hope you will go back to the drawing board.

I mentioned in my first question about hunting only being mentioned one time, and I think the way you are heading is hunters, fishermen, true conservationists are going to be, as well as other multi-users such as the sheepherders and cattlemen, et cetera, are going to be restricted from their own property that they own as taxpayers and as American citizens.

I am extremely concerned about where you are going with this proposed rule. My time is about to run out and so I am just going to ask you to go back to the drawing board. And another thing I would like to ask you is, how are you going to utilize science? What science are you going to utilize in trying to do this management?

Mr. TIDWELL. We are going to use the available science that is relevant and that is accurate. As part of the——

Dr. BROUN. But what is that?

Mr. TIDWELL. As part of the information——

Dr. BROUN. Let me interrupt you because my time is up. Secretary Chu came to our Science Committee and said there is a scientific consensus that there is such a thing as human-induced global warming when there are over a thousand scientists that say that is balderdash. What science are you going to use?

You don't have an answer to that. You are going to utilize something that may be just picked out of the air, and I don't think you or this Administration or even future Administrations, whether Republican or Democrat, can have that utilized as a purpose. I think you need to make some definitions. I am out of time. I will yield back.

Mr. BISHOP. The Chair takes that as a rhetorical question because of the red light.

Mr. Amodei, do you have other questions for this panel?

Mr. AMODEI. Yes, I do, Mr. Chairman. Thank you.

Mr. BISHOP. Please.

Mr. AMODEI. Chief, do you know if there are county road plans in any of the counties that you are presently working on in the Humboldt-Toiyabe for your travel management plan?

Mr. TIDWELL. You know, I am not specifically aware of those, but I assume many counties have not only road plans, but they have their county road system. We factor that into our decisions.

Mr. AMODEI. So you should factor that into your decisions?

Mr. TIDWELL. Yes.

Mr. AMODEI. Are you aware of any instances in the Humboldt-Toiyabe where counties have been gone to as part of this process by your personnel and asked for assistance in road maintenance issues?

Mr. TIDWELL. I am not aware of that, but it is a common practice when we work with counties to enter into agreements where we can work with the counties to help us maintain these roads for the public.

Mr. AMODEI. OK. Thank you. Are you aware of any timber harvest activities in the Humboldt-Toiyabe that have been factored into or should be factored into the travel management plan?

Mr. TIDWELL. Our need to be able to restore forested ecosystems through timber harvest and provide that access of course needs to be factored into our travel planning.

Mr. AMODEI. I understand that, and I am not trying to be glib, but the Humboldt-Toiyabe, at least in the counties that we have discussed specifically, I would be surprised to learn of timber harvest activity.

So, when you talk about that in your plan and road maintenance and all those things that are factored in, I would assume that if there are no timber harvest activities and there haven't been any historically that that would be a fairly minimal consideration in terms of figuring out what that network ought to be on the forest.

Mr. TIDWELL. On a lot of that forest, but over on the Sierra portion of the Toiyabe I would assume that needs to be considered.

Mr. AMODEI. I absolutely would agree with you, but my question is in the context of Eureka, Nye and Elko for purposes of the record, so I just wanted to give an opportunity to respond to that.

I would commend to you the Elko County Commission chairman's testimony, which is available and I understand you won't be here for it, but I will end with saying this. He is going to talk about 104 instances of contacts with your personnel on travel management issues for Elko County in generating that plan and having absolutely no impact on the plan, and the EIS has been signed, and they are living in fear of the record of decision being signed with all of this stuff.

And I am not questioning your integrity. I believe everything you said, but when you talk about collaboration and you talk about the need to coordinate with counties and you talk about the economic impact, I commend to you his testimony because I will commend to you that there is a problem with the Humboldt-Toiyabe plan and there are multiple counties whose jurisdiction overlaps with the Humboldt-Toiyabe in Nevada, and in fact he is going to testify about Utah too, that have some very serious concerns because they feel like—and by the way, there are Indian tribes in the testimony—none, and I don't use that word very often, but his testi-

mony is going to reflect none of that has been incorporated in the plan.

And so my final question for you on this issue is, is there a process to delay the record of decision or reopen the public input process for the travel management plan in the Humboldt-Toiyabe context?

Mr. TIDWELL. It is my understanding that plan has had extensive time spent to be able to reach out to the public and get their comments.

Mr. AMODEI. I don't mean to be disrespectful, but I am on the clock. Is there a process to delay or reopen public input for a travel management plan under your procedures? Yes or no, please.

Mr. TIDWELL. Yes.

Mr. AMODEI. And would you share that process with my office in a timely manner so I can advise the appropriate people to avail themselves of that process?

Mr. TIDWELL. Yes.

Mr. AMODEI. Thank you very much. Last thing. I am going to read something for you that has to do with water rights. Some of my colleagues have alluded to that, and I appreciate your testimony regarding being required to follow the law, comity to state statutes and all this. This is out of the regional office in Ogden, and this is going to be in Mr. Dahl's testimony. It is there for your perusal.

"The United States cannot obtain livestock water rights via Federal law and that compliance with state law process is mandatory. However, Director at the time Forsgren's letter continued with the statement that dismayed ranchers. The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by a livestock owner."

I want to know if that is still the policy of the regional folks out of that region, and if you have had that staffed by counsel for condemnation purposes since it is illegal under Nevada law to own water rights just for livestock purposes when you are the Federal Government.

Mr. TIDWELL. You know, I am not familiar with the direction that the regional forester has put out, but based on what you just shared with me it would be my understanding that for us to be able to continue livestock grazing we have to have water. If you take the water away, it is no longer able for us to continue to graze livestock.

So the purpose that if we are going to invest in improvements to be able to maintain grazing, it seems like there has to be a connection with the water to ensure that we are going to be able to continue to graze livestock.

Mr. AMODEI. And I will wrap up. I don't disagree, but I would suggest that that should be a condition of your permit and not that you achieve ownership of the actual—and I will defer to Mr. Mumm, but that is something that is a bird of an entirely different feather as opposed to taking ownership of a proprietary right.

Thank you very much. I appreciate your candor. Thank you, Mr. Chairman.

Mr. BISHOP. Ms. Lummis, do you have more questions for this panel?

Mrs. LUMMIS. I do not, Mr. Chairman, but I wish to associate myself with your remarks earlier. I was listening in the anteroom when you were visiting, and I do associate myself with your remarks.

I would also like to point out that under NEPA, when counties are consulted, the word that is used in NEPA is they are to "cooperate" with the counties. The Federal agencies are to cooperate with the counties. Not collaborate. Not coordinate. Cooperate.

And what we are seeing is Federal agencies seeing that as that the counties should cooperate with the Federal Government when NEPA actually requires that the Federal Government cooperate with the counties. I yield back. Thank you.

Mr. BISHOP. Thank you. Let me hopefully conclude this with just a couple more questions.

Dr. Stewart, you haven't had a chance to talk to anybody here yet, so can I simply ask you, do you think that the original planning regulations that were developed under NFMA with respect to viability were outside statutory authority?

Dr. STEWART. Yes, I do.

Mr. BISHOP. Well, then can I follow up? How did that affect planning for the agency during your time there?

Dr. STEWART. Well, it impacted everything. Just to give you a good example, I was regional forester in California when the northern spotted owl was listed. We had a similar viability plan for the California spotted owl, and when it was ruled that the northern owl plan would not assure viable populations we immediately started in a process that resulted in reduction of timber harvest and a lot of other activities in the Sierra Nevadas in order to assure as best we could the long-term viability of the California spotted owl.

And the idea was this was not a listed species, but because it was using the same strategy, it was clear to me at the time that we were going to end up in the same place and so we precluded that and we were able to continue activities. We were never shut down, and I think to this day we have never been totally shut down, but it certainly curtailed activities.

And I might add the process that was started in 1992 to come up with a viable long-term plan has never been fully implemented. It is still in litigation, so it has become what is called a wicked problem.

Mr. BISHOP. Thank you. Mr. Mumm, if I could ask you one question then. When the organized motorized recreation community originally supported the 2005 travel management rule was there any indication given that it would be used to implement the landscape level closure of roads?

Mr. MUMM. It was our understanding that the intent behind the rule was to begin management for recreation that was much needed. It was not intended to be a closure rule.

Mr. BISHOP. Then I realize I am asking you to project something here, which is somewhat unfair, but how do you think this proposed planning rule may impact recreation access for your members, in 20 words or less?

Mr. MUMM. Let me give you an example on the Black Hills National Forest. Users brought to the Forest Service plans and maps for over 200 miles of single track trails. This is just one type of user. They ended up with 23 miles of trails. That is about an hour's worth of riding. I think that that is indicative of what we are looking at.

Mr. BISHOP. Thank you. Let me conclude here unless are there other questions, another round?

[No response.]

Mr. BISHOP. All right. Let me try and conclude this panel by thanking you for spending two hours plus with us here. That is an unusual length of time for a panel, but I think one of the things that is indicative is I am surprised at the number of Members who are here and the amount of questions that came up there.

Chief Tidwell, in all sincerity, you did a great deal of good when you were back in the real world where I live before you came here to what I consider not the real world, and what you say you wish to accomplish and what you are doing I think are wonderful words. The problem that we have is that what your goals are, which seem to be extremely rational and progressive, is not indicative of the verbiage that is in this proposed rule.

This rule is so broadly written with so many new terms that have no definition anywhere else that it presents all the potential for litigation that those who are in this industry fear. It presents all the rules for abuse by bureaucracies in the future, looking at how to implement this rule, some things like the word science not being in what you think should be a scientific rule.

I truly wish the Forest Service would go back and tighten down the rules so it says indeed what you intend it to say because it doesn't right now, and there is not a great deal of trust, as you have heard from other Members here, with experiences we have had in the past looking forward until there is something that is more specific and tightened and, once again, talks with greater emphasis on the multiple use aspect vis-à-vis preservation. It doesn't happen in this rule. There are problems with this rule.

I hope you don't go forward with this until those problems have been remedied in a significant, significant way. And based on what you have done in the past, especially when you were in my state, I know you can do that. I trust your instincts. I trust your goals there.

I don't know if you ever read the book Green Underwear by a former——

Mr. TIDWELL. I have.

Mr. BISHOP. Was he there when you were? Did you know the guy?

Mr. TIDWELL. Yes. He was my regional forester.

Mr. BISHOP. Great guy. And what that talked about is an era when most of the people in the Forest Service had agriculture backgrounds and they used a whole lot of common sense. We desperately need that again today.

Thank you for being here with this panel. At this time, after putting you through this laborious process of having to listen to all of us, I apologize for that, but thank you for being here. Thank you for your testimony. Everything that you have written and other

things that you indicated you would like to be as part of that written testimony will be given to us.

There may be further questions from Members of the Committee that may be addressed to you. We would ask if you would respond to those in an appropriate period of time if indeed that happens. But with that, thank you and with our appreciation for you being here.

We ain't done here yet. We have another panel still to come forward. If I could ask the following people to join us again at the table where the seats are warm? Mr. Demar Dahl, who is the Chairman of the Elko County Board of Commissioners; Glen Porzak, who is from the National Ski Areas Association; Dr. Mike Dombeck, who is the former Chief of the U.S. Department of Agriculture's Forest Service; and Mr. Garrett VeneKlasen, who I hope I pronounced that properly, who is the Public Lands Coordinator for the New Mexico Trout Unlimited.

If you would be kind enough to join us at the table? As you are getting situated there, I think you saw the process that we have tried to go along with. Your written testimony, as with the first panel, is in the record. Anything you also want to add in writing to that we can add as well.

We are asking for oral testimony to be limited to five minutes as well as the five-minute questioning rule that will be here. Once again, when the light goes on in front of you, green means we are timing you, yellow means you need to sum up, and red means the five minutes have elapsed at that time.

We are happy to be here. Commissioner Dahl from Elko, I just hope you realized it was 60 degrees overnight here. I am sure that equates to what you experience in Elko, and I would like to ask your representative if he would be kind enough to introduce his constituent here, although I have to remind you in Utah it is Eureka.

Mr. AMODEI. Thank you, Mr. Chairman. I have been to Eureka, Utah, and also have a very fond spot in my heart for Eureka, Nevada.

Mr. Chairman and Ranking Member Grijalva, I appreciate the opportunity to introduce Mr. Demar Dahl today. Mr. Dahl is chairman of the Elko County Commission and has been the lead negotiator in county dealings with the Forest Service on the travel management plan for the Humboldt-Toiyabe National Forest for the past two years. He conducted a number of hearings, taking testimony from expert witnesses with Forest Service involvement and participated in many meetings, both facilitative and otherwise, with the Forest Service.

Additionally, he has also worked on legislation that prevents agencies from using someone else's property to prove beneficial use when filing for water. That effort was upheld by the state Supreme Court, and you will hear testimony regarding that as you have some questions prior. In his prior experience, Mr. Dahl is a charter member of the Federal Land Conference, president of Nevada Cattlemen's Association and member of Nevada's State Environmental Commission.

I am pleased to introduce Mr. Demar Dahl to the Subcommittee and happy he was willing to lend his expertise and proposed plan-

ning rule, special use permits perspectives to the Committee here today. Thank you, Mr. Chairman and Mr. Ranking Member.

Mr. BISHOP. Thank you. Mr. Dahl, you are recognized for five minutes.

STATEMENT OF DEMAR DAHL, CHAIRMAN, ELKO COUNTY BOARD OF COMMISSIONERS

Mr. DAHL. Thank you, Congressman. Mr. Chairman, Members of the Committee, as has been stated, I am Demar Dahl. I am the Chairman of the Elko County Board of Commissioners.

Listening to testimony here today from Chief Tidwell, it would make me think that the travel management plan of the Forest Service was designed to guarantee access to the forest by the public and to make sure that there are roads for everyone to use. That has not been our experience in Nevada.

It is difficult in a short period of time to convey to you the importance of the Forest Service travel management plan to the citizens of Elko County. Let me begin by saying that Elko County commissioned an economic impact study by the Western Economic Analysis Center wherein it was determined the potential direct and indirect economic losses to minerals, recreation and ranching in Elko County will be as much as $132 million a year because of travel management.

Our Commission was told by the Forest Service in January of 2009 that they were going to implement the travel management plan. They told us then that they did not anticipate closing any roads. We found out within a couple of weeks that what they were going to do is create a system of roads, and inside of that system all of the roads would be open. Outside of the system the roads would all be closed. This equated to about 1,000 miles of roads that were going to be closed in Elko County.

Between January of 2009 and last May, we have documented 104 times that we have either met with state and local forest personnel, held formal hearings, submitted Freedom of Information Act requests, held county planning sessions and public meetings with 700 in attendance at one of those meetings and submitted specific concerns and questions to the Forest for answers. In other words, we have done our best to try to get to the bottom of what this plan really means to us and to get our land use plan in Elko County considered, and we have had no luck.

We have made it clear to the Forest Service that if they can justify road closures or the curtailment of other activities by the public with good monitoring and with good science we will support them, and thus far they have only in a very few cases been able to do that.

All other counties in Nevada have had travel management done to them. Now the other counties in Nevada want to join with us and reopen their own plans. We have been joined by the Indian tribes in northeastern Nevada and approached by two counties in Utah who have heard what we are doing and want a redo on their plans.

Eureka County wrote to us and said that they had many roads, Forest Service roads, that the Forest Service would not include in their system, and they included a sentence that says, "You may

find it interesting that none of the comments by Eureka County resulted in any changes to the proposed decision." Now they didn't work at that as hard as we did. I mean, we have been working at it. We have been doing this since January of 2009. But they worked at it, and they weren't able to have an impact.

Nye County wrote to us and said that their plan was substandard in many ways, but most profoundly in the lack of nearly 3,000 commonly used roads that were not added to the system.

With our travel management plan, only roads that are open will be marked open. Those that are closed will not be marked. This makes it easy for someone to get on a closed road and be subject to a citation. Camping will only be allowed two car lengths from an approved road. Big game retrieval for deer is not allowed. All roads leaving or crossing private land will be closed unless there is an easement granted. Roads will disappear without use, and it will make it difficult to get to a fire when it is easy to contain before it threatens life and property.

There are many other reasons that we in Elko County oppose the Forest travel management plan. If there is an opportunity for a field hearing of this Subcommittee to be held in Elko, Nevada, it will be greatly appreciated by the citizens there. We have seen a slow but constant erosion of our rights to utilize the natural resources of our county as a result of the actions by the Federal agencies.

We are now asking you to help us protect our economy and way of life for our benefit and for the benefit of generations to come. Thank you.

[The prepared statement of Mr. Dahl follows:]

Statement of The Honorable Demar Dahl, Chair, Elko County Board of Commissioners, Elko, Nevada, and National Cattlemen's Beef Association

Honorable Chairman Bishop, Ranking Member Grijalva, and Members of the Subcommittee:

My name is Demar Dahl, and I am submitting these comments for the record on behalf of the Elko County Board of Commissioners regarding the Travel Management Plan and on behalf of the National Cattlemen's Beef Association on the matter of water rights.

Travel Management Plan

On behalf of the Elko County Board of Commissioners, of which I am the Chair, I would first like to relate to you our experiences in dealing with the United States Forest Service in the development of the Travel Management Plan (TMP) for Elko County. The Forest Service made their first presentation to the Elko County Commission to explain their TMP in January of 2009. Elko County has documented 104 incidences between January 8, 2009 and May 5, 2011 where the county has had meetings with state and local Forest personnel, County formal hearings, County strategy meetings, and one public meeting with seven hundred in attendance. We have also submitted Freedom of Information Act (FOIA) requests and written questions to the Forest Service. In other words, we have worked hard trying to get straight answers on their plan and trying to get them to take our County Land Use Plan into account, but with no success.

The final draft of the Environmental Impact Statement has been signed by the Forest Service and they are preparing to sign the Record of Decision (ROD). Before the ROD is signed there will be one last meeting, set for December 7, 2011. Included in that meeting will be the local Indian Tribes and at least three other Counties from in Nevada. Two of the Counties included will be Eureka and Nye, which, along with all the other Counties in Nevada that have forests within their boundaries, have had their Travel Management Plans completed by the Forest Service. In a letter from Eureka County asking to participate in the joint meeting with Forest Service, they wrote, "Eureka County was involved in a TMP for the USFS land located

within Eureka, Lander, and Nye counties in 2009 (Austin Tonopah Ranger Districts). We have been following the process that USFS is taking with Elko County and we have seen a distinct, disingenuous pattern by USFS related to our experience and what Elko County is currently going through."

The letter continued, "Additionally when Eureka submitted substantive comments on the USFS Notice of Proposed Action (NOPA) that listed specific roads that have been omitted, removed, or misrepresented, the USFS responded to our comments with perfunctory, disingenuous statements that made it clear that they were not going to properly coordinate with Eureka County on inclusion of roads even if they were justified. We found that many roads we were concerned about were basically just omitted (i.e. not recognized at all). Many of the responses by USFS on the omitted roads (that in reality do exist) read 'this road was not on the Forest road inventory and was not included in the proposed action.' What this really meant was 'regardless of your comment on the real existence of and need for the road, we are plodding ahead with our decision'. None of the 30 plus omitted roads that we pointed out were included. Also, we documented roads that were closed by USFS due to being considered 'redundant.' We documented a few of these roads were in existence and used in the late 1890's (through historic plat maps) and were still in existence and used quite heavily in 2009. The fact these roads were used and kept open by use for 120 years should have been evidence enough of the need and importance of the road. You may find it interesting that none of the comments by Eureka County resulted in any changes in the proposed decision."

Such has been our experience in Elko County. In 104 encounters with the USFS in less than three years, we have seen no change in their plan as a result of our input.

In a letter from the Vice Chairman of Nye County we were told, "Nye, Lander and Eureka Counties share the belief that the Austin Ranger District Travel Management Plan is substandard in many ways, but most profoundly in the lack of nearly 3,000 commonly used roads. I attended the Public Scoping meetings and witnessed the vast public input to the process only to realize the tiniest portion of the public input was incorporated into the final plan."

These are some of the specific objections Elko County has to the Forest Service Travel Management Plan as now proposed:

- Elko County commissioned an economic impact study by economist Dr. George Leaming, PhD. of the Western Economic Analysis Center. His study determined the potential direct and indirect economic losses to minerals, recreation and ranching in Elko County to be as much as one hundred thirty two million dollars.
- Elko County has not been able to obtain an accurate inventory from USFS of exactly which roads and how many miles of roads will be closed because they have a "system" of roads and all roads outside the "system" are closed even though they are not inventoried. There is no monitoring or good science to justify the closures.
- There will be no big game retrieval by motorized vehicle except for elk and then only within one half mile of a road. There will be no retrieval of deer. This is one of the parts of the TMP also opposed by Nevada Department of Wildlife.
- Roads that are marked "open" will be open; however, those that are closed will not be marked "closed." Elko County believes this will make criminals of inadvertent trespassers. When, if sited, someone wants to contest the citation, it will be necessary for them to travel to Reno (about 300 miles away) twice: once to plea and once to settle.
- Roads crossing or off of private lands will be closed unless the land owner is willing to grant a public easement across the private property. It is estimated that ninety percent of property owners will allow someone to cross their land if asked to do so. If USFS closes these roads it will be the Forest Service, not the landowner, who locks up the public land. Also, there is a health and safety issue with roads off private lands being closed. In cases of a fire, roads that have disappeared over time without use will prove a threat to life and property when their closure prevents early containment.
- As proposed in the current TMP, dispersed camping will, for the most part, be limited to two car lengths from an approved road. This will make many campsites off limits, even if they have been used for many years.

Elko County has taken every step available to it under law to assist in the development of a TMP that is acceptable to both local citizens and the Forest Service. We appreciate the opportunity to voice our frustration with the roadblocks we have met, and hope that this hearing may help to alleviate the problem by improving the spirit of cooperation within the agency.

Water Rights

On behalf of the National Cattlemen's Beef Association (NCBA), of which I am a member, I would also like to submit to the record comments regarding the Forest Service's recent policy on special use permits as they relate to rancher-owned stockwater improvements.

I am a member of NCBA, the nation's oldest and largest national trade association for cattlemen which represents more than 140,000 cattle producers through direct membership and their state affiliates. NCBA is producer-directed and works to preserve the heritage and strength of the industry by providing a stable business environment for their members. In the west, where roughly forty percent of the cow herd spends some time on federal lands, the policies held by the Forest Service are of great importance to NCBA.

The ranching industry is very concerned with the recent efforts by the Forest Service to acquire ownership of water rights in return for the continuance of permitted activities on National Forest System lands. We have seen examples of this with the ski industry, with water districts, and, recently, with permitted ranching activities in the west. In Wyoming, ranchers report the Forest Service has recently become more aggressive about acquiring ownership of stock water rights. In Nevada, the agency has delayed action on ranchers' requests for permits for maintenance of rancher-owned stockwater because of the agency's disagreement with Nevada's state water law. This has resulted in an under-utilization of the ranges by livestock due to a lack of full distribution of water resources on Forest Service permits. While the Forest Service generally has not formally rejected use permits, they have delayed issuing those permits in order to pursue their policy of obtaining stockwater rights. This delay has, in my opinion, prevented the full use of the range by wildlife as well as livestock.

Thanks to improvements largely accomplished by ranchers' investments of their own time and resources on Forest Service lands, abundant wildlife habitat has sprung out of landscapes formerly lacking a large number of water resources. Not only that, but many private stockwater owners on National Forest System lands have memorandums of understanding, (or MOUs) with the Forest Service, where they voluntarily allow the agency to put a designated amount of water to use on agency initiatives. Now, the agency's demand for partial ownership of water rights is threatening these MOUs and the spirit of cooperation that has long existed on the range.

The Forest Service's demand flies in the face of federalism and the prior appropriation doctrine for water rights which exists in much of the west. The federal government, except in narrow cases, continues to give primacy over the waters within individual states to those states' laws, regulations, and agencies. For the benefit of the resource, which ranchers are striving every day to improve, and which the Forest Service is mandated to care for, the current Forest Service policy of delaying maintenance and establishment of stockwater resources needs to be reevaluated and discarded.

Along with this testimony, I am submitting for the record two official Forest Service documents outlining their water rights policy. One is a letter from Intermountain Regional Director Harv Forsgren, dated August 29, 2008, informing Forest Supervisors that "It is FS policy (FSM 2541.03 & FSM 2541.32) to obtain and maintain water rights needed for National Forest purposes under State and Federal law in the name of the United States." He recognized that "the United States cannot obtain livestock water rights via Federal law" and that "compliance with the State law process is mandatory." Director Forsgren's letter continued with a statement that dismayed ranchers: "The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by a livestock owner."

The second document, an August 15, 2008 Forest Service briefing paper on Nevada State Water Law, made the agency's stance clear: "it is the policy of the Intermountain Region that livestock water rights used on national forest grazing allotments should be held in the name of the United States. . .The United States must have a water right recognized by the State before federal funds are expended for construction or reconstruction of any livestock water development or facility."

The agency's goal, and means of achieving it, is evident. Ranchers, unfortunately, are caught in the crosshairs.

In closing, should your subcommittee see fit to hold a field hearing on the TMP and water permit issues in Elko, Nevada, it would be greatly appreciated by the citizens there. We have seen a slow but constant erosion of our rights to utilize the natural resources of our county as a result of the actions by the federal agencies.

We are now asking you to help us protect our economy and way of life for our benefit and for the benefit of generations yet to come.

Mr. BISHOP. Thank you, Commissioner.
Mr. Porzak?

STATEMENT OF GLENN PORZAK,
NATIONAL SKI AREAS ASSOCIATION

Mr. PORZAK. Thank you for the opportunity to testify on behalf of the National Ski Areas Association. The Association has 120 member ski areas that operate on National Forest System lands. These public ski resorts accommodate the vast majority of skier visits in the United States and are located in 13 states.

At the outset I would like to thank Chairman Bishop for highlighting the important topic of water rights for special use permittees and to thank Representative Tipton for his leadership on this issue and his recent correspondence to the Department of Agriculture.

Collectively, ski areas invest literally hundreds of millions of dollars on water rights to support and enhance their operations. Often these water rights are part of the collateral that support their loans that are instrumental to their ability to operate the ski resorts. The ski areas use water for snow-making, lodging facilities, culinary purposes and irrigation. Water is crucial to the ski area operations, and water rights are considered to be a valuable asset to the ski area owners.

The ski areas require permit language that protects these water rights and accommodates the complex and diverse water systems and state laws through which water is appropriated and applied to a beneficial use. The ski industry and the Association have worked collaboratively in partnership with the Forest Service over the past to address the interests of both the industry and the Forest Service on water matters.

Specifically, the parties reached a consensus water clause in 2004 that has been in effect for the past seven years and has operated without any problems, notwithstanding the Forest Service now seeks to change, not clarify, despite the fact that there have been no problems. The existing clause provides for the exclusive ski area ownership of water rights that arise off of the ski area permit area and the co-ownership by the ski areas and the Forest Service of certain water rights that arise on the special use permit area.

The Forest Service is now seeking to impose a new clause that requires the ski areas to transfer exclusive ownership of many types of water rights to the Federal Government. These are valuable property rights which the Forest Service now wants for free. Not only will the ski areas not be compensated for these valuable water rights; they would also lose the ability to control the future use of these water rights.

If these water rights are owned by the U.S. Government, the ski areas would have no guarantee that the water will continue to be used for the ski area purposes. Congressman, there is nothing in the current clause that would restrict the Federal Government to using the water for the ski area purposes.

Moreover, the new clause would also prohibit the ski areas in perpetuity from selling or transferring ownership of certain other water rights that were purchased or developed by the ski areas entirely on private property or on non-Forest Service Federal lands. No compensation is offered for this restriction, and this restriction would have a significant adverse effect on the value of these ski area assets and their financing.

Requiring the ski areas to transfer ownership or limit the sale of the water rights without compensation is no different than the government forcing a transfer of ownership of chair lifts, snow cap snowmobiles or exercising eminent domain without any compensation. The Forest Service action is simply unprecedented.

I clarify again, this is not a clarification of the 2004 clause as Chief Tidwell mentioned. The 2004 permit runs two clauses and is one page. The new one is nine pages.

I would also point out that all water rights owners should be concerned about this. Because of the significant percentage of water that originates on National Forest Service lands, this change in policy poses a threat to the current system of state allocation and administration of water and could impact counties, cities, owners of private residences, marinas and other businesses such as ranching, mining or utilities.

The bottom line is Congress has not delegated to the Forest Service the authority to require the ski areas to transfer ownership of water rights to the U.S. as a permit condition. We respectfully request Congress's assistance in reversing this new Forest Service policy. Thank you very much.

[The prepared statement of Mr. Porzak follows:]

Statement of Glenn Porzak, Attorney at Law, Porzak Browning & Bushong LLP, on behalf of the National Ski Areas Association

Thank you for the opportunity to testify today on behalf of the National Ski Areas Association. NSAA has 121 member ski areas that operate on National Forest System lands under a special use permit from the U.S. Forest Service. These public land resorts accommodate the majority of skier visits in the U.S. and are located in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Hampshire, New Mexico, Oregon, Utah, Vermont, Washington and Wyoming. Sixteen (16) members of the Natural Resources Committee have public land ski areas in their state. At the outset, we would like to thank Chairman Bishop for highlighting the important topic of water rights for special use permittees in this oversight hearing this morning. We would also like to thank Representative Tipton from Colorado for his leadership on the issue and recent correspondence to the Secretary of Agriculture on behalf of ski areas.

Collectively, ski areas invest hundreds of millions of dollars on water rights to support and enhance their operations. Ski areas use water for snowmaking, lodging facilities, restrooms, culinary purposes and irrigation. Water is crucial to ski area operations and ski area water rights are considered valuable assets to ski area owners. Ski areas require permit language that protects these rights and accommodates the complex and diverse water systems and state laws through which water is appropriated and applied to a beneficial use on Forest Service lands.

The ski industry and the Association have worked collaboratively and in partnership with the Forest Service over the past decade to address the interests of both the industry and the Forest Service on water matters. Specifically, the parties reached a consensus water clause in 2004 that has been in effect for the past seven years which the Forest Service now seeks to change, despite the fact that there have been no problems with the existing clause. The existing clause provides for exclusive ski area ownership of water rights that arise off of the ski area permit area, and co-ownership by the ski areas and Forest Service of certain water rights that arise on the special use permit area.

From the ski areas' standpoint, the current arrangement is working well and does not require any changes. However, the Forest Service is now imposing a new water clause that requires the ski areas to transfer exclusive ownership of many types of water rights to the federal government. These are valuable private property rights which the Forest Service now wants for free. Not only would ski areas *not* be compensated for these valuable water rights, they would also lose the ability to control the uses for which this water is applied in the future. If these water rights are owned by the U.S. government, the ski area would have no guarantee that the water will continue to be used for ski area purposes in the future.

Moreover, the new water clause would also prohibit ski areas in perpetuity from selling or transferring ownership of certain other water rights that were purchased or developed by the ski areas entirely on private or non federal lands. No compensation is offered for this restriction and this restriction would have a significant adverse effect on the value of these ski area assets. The rationale provided by the Forest Service for making changes to the clause at this time is that "there is a new sheriff in town."

Ski areas object to these new requirements. Requiring ski areas to transfer ownership or limit the sale of water rights without compensation is no different than the government forcing a transfer of ownership of gondolas or chairlifts, snowcats, or snowmobiles, or even exercising eminent domain without any compensation. It is unprecedented to require the ski industry to surrender ownership of valuable assets to the U.S. government without any compensation.

All water right owners, not just ski areas, should be concerned about this precedent. Because of the significant percentage of water that originates on National Forest System lands, this change in policy poses a threat to the current system of state allocation and administration of water rights. This issue is larger than just ski areas—it would impact all entities that have water rights associated with any National Forest System lands including cities and counties, owners of recreation residences, marinas and summer resorts, and other businesses such as ranching, mining, or utilities.

Water right allocation is generally a matter of state, not federal law. State law allows private ownership of water rights for diversion and use on federal land. Rather than unlawfully taking property from private entities as a permit condition to use or occupy National Forest System lands, the agency must acquire and exercise federal water rights on its own in priority in accordance with state laws.

As I mentioned, ski areas have developed water rights at great expense and effort. Resort owners have invested hundreds of millions of dollars in acquiring water rights to enhance their operations and the experience of their guests. Ski areas have been excellent stewards of these resources and are in the best position to protect these water rights as they have the expertise, staffing and resources necessary to maintain them.

Congress has not delegated to the Forest Service the authority to require the ski areas to transfer ownership of water rights to the U.S. as a permit condition. Likewise, the Property Clause of the U.S. Constitution does not give the agency the authority to use permitting conditions as a basis to obtain federal ownership of privately owned water rights without the payment of fair compensation.

Ski areas will not agree to the new water clause and respectfully request Congress' assistance in reversing this new Forest Service policy. The ski areas intend to ensure that private property interests are protected and state laws regarding water rights are honored.

Thank you for your consideration of this testimony.

Mr. BISHOP. Thank you.

Chief Dombeck?

STATEMENT OF DR. MIKE DOMBECK,
FORMER CHIEF, USDA FOREST SERVICE

Mr. DOMBECK. Thank you, Mr. Chairman, Ranking Member Grijalva. I appreciate the invitation to testify before the Committee. I have been in this room many times over the years but not for about the last 10 years.

I grew up on the Chequamegon National Forest in northwestern Wisconsin, paid my way through college as a fishing guide primarily, but also hunting, if the gentleman from Georgia were here,

and am still an avid hunter. In fact, I just spent the last three weeks hunting and interrupted that to come to D.C. this week.

I own land within the national forest boundary. I manage it for recreation, wildlife, harvest timber, and I have also had the opportunity of spending a career working for the public land management agencies, so I have sort of stepped back now after no longer being in a position of responsibility but in a sense to sort of look at history as I hear the debate today, and I think it is important for me. I always reminded myself at least that history in a sense is sort of repeating itself, and public land management controversies go back almost to day one.

The reason we have a Taylor Grazing Act, a National Forest Management Act, many other pieces of legislation, really reflected in controversies of impaired watersheds and problems with a loss of topsoil that continue today that spurred President Theodore Roosevelt and Gifford Pinchot and many others to move forward with many of the policies that were made in fact in this very body.

One of the interesting things with our society is we tend to each want our piece of the pie, and the reality is there is not enough. The pie isn't big enough for everybody to have all of what they want, and hence we have these competing interests in fact that we hear at this hearing where we have wildlife interests, fishing interests, hunting interests, offroad vehicle users.

And I would hope that in this dialogue as we deal with the specifics of the issues that we sit back and ask ourselves what do we want the place to be like in 20 years, in 50 years, and how are we going to get there, keeping in mind that the national forests really do provide a broad spectrum of recreation opportunities, just like the Nation does. I mean, we have everything from theme parks to golf courses in the national forests, and the public lands also provide a wide spectrum of recreation opportunities.

I suspect they will continue to do so for motorized access, for physically impaired, to solitude, to wild places where a young person connecting in nature can hike in and go on a trophy elk hunt or experience some of the best fishing in the world that occur on these public lands.

In 1999, a committee of scientists in another effort to deal with the planning and regulation under my watch as Chief of the Forest Service really focused on three things: the social, economic and ecological side of the equation that keeps us all going. In fact, our challenge is striving at that balance. Chief Jack Ward Thomas used to talk about the land being the goose that lays the golden eggs, and when we don't take care of that land as we should in fact we all suffer. The economics suffer. The social aspects of it suffer.

So, I hope that as we discuss and consider the various regulatory approaches and the various issues that the constituencies have that we will take into account the long haul. What do we want the land to be like in 20 years, in 50 years, and the fact is we need to be building topsoil in the country—today we are still losing topsoil as a nation—and some of those basic things that are important.

So, with that, let me just say I appreciate the opportunity to be here, and I look forward to any dialogue that we might have that might be constructive. Thank you.

[The prepared statement of Dr. Dombeck follows:]

Statement of Dr. Mike Dombeck, Former Chief, U.S. Forest Service

Chairman Bishop, Ranking Member Grijalva, and members of the Subcommittee:

Thank you for inviting me here to testify today. My name is Mike Dombeck. I am an avid outdoorsman. I spend several weeks each year recreating on public lands: hunting, fishing, camping and enjoying the national forests across the country, but mostly in my home state of Wisconsin. I was raised on the Chequamegon National Forest in northern Wisconsin's lake country where I spent 11 seasons working as a fishing guide, which paid my way through college. I have also owned land within the national forest boundary for over forty years, which I manage for wildlife habitat, recreation and timber harvest. I had the privilege of spending a career in public service with the federal land management agencies and retired as Chief of the Forest Service in 2001. I spent the past 10 years at the University of Wisconsin-Stevens Point as UW System Fellow and Professor of Global Conservation. I am currently Director of the David Smith Post-Doctoral Research Fellowship in Conservation Biology. I have been and currently am a member of several conservation organizations. I mention all of this to make the point that my testimony comes not from the singular perspective of an advocacy group or agency but from someone who uses and cares deeply about land, and has witnessed the benefits and challenges of public land management over the past several decades.

Before I discuss some of the specific issues that are the subject of this hearing, I would like to take a step back and consider today's issues in a broader historical context. The Spanish philosopher Jose Ortega y Gasset once observed: "We have need of history in its entirety, not to fall back into it, but to see if we can escape from it."[1] As long as our public lands have existed we have been challenged by the need to balance uses of the land, and manage these uses in a way that sustains the long-term health and productivity of the land. It is a challenge that we as a society have not always met. And when we have met this challenge, we have too often done so only after experiencing the consequences of asking too much of the land and taking more than it can provide.

For example, the very origins of the national forests can be traced back to the need to maintain watershed function[2] at a time it was becoming clear that overgrazing and unsustainable timber harvesting impaired the ability of watersheds to catch, store and release water. This resulted in heavy floods, unnaturally low summer flows, and increased erosion and sedimentation. The need to protect and restore watershed function is even greater now than ever before, as about 124 million Americans rely on national forests and grasslands as their primary source of clean drinking water.

Despite the early recognition of the need to protect watersheds, public lands were once viewed as a vast storehouse of inexhaustible resources. The result of this approach was environmental destruction and, along with it, social and economic disruption. Over time, this approach has created a need for regulations that curtail destructive activities. Before the Taylor Grazing Act, unlimited grazing resulted in widespread range deterioration. By the 1870s federal rangelands were greatly overgrazed. In 1887, a severe winter, coupled with malnutrition, killed millions of stressed livestock, bankrupting many cattle companies that were involved in land-damaging and speculative grazing practices. Before the National Forest Management Act, clearcutting had become the preferred method of timber harvest, resulting in losses in forest productivity, degraded fish and wildlife habitats, and increased fire hazard. As a hunter and angler, I feel compelled to also point out that fish and game regulations arose in response to severe over-harvest that wiped out or greatly depleted many populations of game species.

These experiences point to a lack of humility in our approach to natural resources. Our society's desire to maximize outputs—whether it is more livestock, more timber, or more fish and game—has consistently led us to take more from the land than it can sustainably provide. As our demands on national forests grow along with our population and the advent of new technologies, the need to put in place management prescriptions that provide for sustainability becomes increasingly acute. What

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[1] Jose Ortega y Gasset, *The Revolt of the Masses* (New York: Norton, 1993).

[2] "Congress's conference committee report on the General Land Law Revision Act of 1891 had cited the need to protect western watersheds as the rationale for forest reserves when it had given the president the right to establish forest reserves by proclamation." Richard White, *It's Your Misfortune and None of My Own: A New History of the American West* (Norman: University of Oklahoma Press, 1993).

we leave on the land for future generations is ultimately more important than what we take.

This need is evident today with the tremendous growth in recreational use of our national forests. In 1950 there were an estimated 27 million recreation visitor-days per year on national forest system lands. In 2009, the national estimate was 173.5 million. The forest road system grew from approximately 206,000 miles in 1974 to more than 374,000 miles today.[3] During my time as chief of the Forest Service we were in the midst of a dramatic growth in the motorized use of national forests. The number of off-highway vehicle (OHV) users in the U.S. grew from approximately 5 million in 1972 to over 51 million in 2004. More than 11 million people using OHVs visited national forests and grasslands in 2004.

High numbers of visitors to national forests are a good thing. It means people are enjoying the outdoors, which is important to a healthy lifestyle and to developing future stewards of our natural resources. One of the greatest social changes over the past century has been the shift from a rural to now mostly urban lifestyle. With the help of science and technology a greater proportions of humans than ever before are living farther removed from the land. In my view, one of our biggest challenges is reconnecting people with the land and nature. That doesn't mean we all have to live in the woods or on the prairie. But we do need a populous that understands and appreciates the land that ultimately sustains our needs and life styles. We need to invest in outdoor and environmental education like never before. The public lands provide an important place for our youth to connect with the land and nature.

A Forest Service report found that "More than 57 percent of visits to National Forest System lands are done primarily for physical activity, such as hiking, biking, and skiing."[4] All this activity provides significant economic benefits. According to the same Forest Service report, recreation activities on national forests and grasslands have helped to sustain an estimated 223,000 jobs in rural areas and contributed approximately $14.5 billion annually to the U.S. economy.

However, if it is not properly managed this level of recreational use can have negative impacts on national forest resources. In 2004, my successor as chief of the Forest Service, Dale Bosworth, identified unmanaged motorized recreation as one of the top four threats to national forests, estimating that there were more than 14,000 miles of user-created trails, which can lead to long lasting damage.

A 2009 GAO report titled, *Enhanced Planning Could Assist Agencies in Managing Increased Use of Off-Highway Vehicles,* identified a range of potential environmental impacts associated with OHV use, including:

- damage to soil, vegetation, riparian areas or wetlands, water quality, and air quality,
- wildlife habitat fragmentation, and
- spread of invasive species.[5]

The report stated that

> ". . .studies on the impacts of OHV use indicate that soil damage can increase erosion and runoff, as well as decrease the soil's ability to support vegetation. Additionally, research has shown that habitat fragmentation from OHV use alters the distribution of wildlife species across the landscape and affects many behaviors such as feeding, courtship, breeding, and migration; habitat fragmentation can also negatively affect wildlife beyond the actual amount of surface area disturbed by roads. In 2007, the U.S. Geological Survey reported that as a result of OHV use, the size and abundance of native plants may be reduced, which in turn may permit invasive or nonnative plants to spread and dominate the plant community, thus diminishing overall biodiversity."[6]

I point out these impacts not to criticize OHV users—we all rely on motorized access to some degree—but to underscore the need for effective management in order to prevent harm to the land. When motorized use is confined to properly maintained roads and trails, concerns are limited. But where OHVs proceed with few restrictions, the damage can be severe. The Forest Service's response to this management challenge was the Travel Management Planning Rule, finalized in 2005. The Rule

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[3] USDA Forest Service, *The U.S. Forest Service—An Overview,* http://www.fs.fed.us/documents/USFS_An_Overview_0106MJS.pdf.

[4] News Release: *USDA Forest Service Report Shows Economic, Health Benefits of America's National Forests and Grasslands.* Release No. 0359.10. July 7, 2010. Accessed November 9, 2011 at www.usda.gov.

[5] U.S. Government Accountability Office. Report to the Subcommittee on National Parks, Forests and Public Lands, Committee on Natural Resources, House of Representatives. *Federal Lands: Enhanced Planning Could Assist Agencies in Managing Increased Use of Off-Highway Vehicles.* June 2009. GAO–09–509.

[6] U.S. Government Accountability Office 2009.

instituted a management framework that would provide for motorized access while reducing impacts and minimizing user conflicts. The rule requires each National Forest to designate roads, trails and areas that are open for motorized use including decisions on where OHV use may occur. Each National Forest is required to publish a Motor Vehicle Use Map (MVUM) indicating those decisions, and motorized use is to be confined to those defined routes.

The Forest Service has nearly completed its Travel Management Plans. Over the past six years, these plans have been developed with extensive public involvement. While I am not here to defend the specific outcomes of each plan, which were the product of public processes and local input, it is important to recognize that Travel Management Plans are essential to an effective management approach that balances the various recreational uses of public lands and prevents ecosystem degradation.

Another important component of Travel Management Planning is the identification of the roads and trails that will make up the Forest Service's network over the long term. Currently, the Forest Service lacks the resources to adequately maintain its system of roads and trails, and faces a maintenance backlog of $8.4 billion nation-wide. Poorly maintained roads and trails reduce access and diminish sporting opportunities, for example by contributing large amounts of sediment into rivers and streams. Thus, it is sensible for the Forest Service to analyze its network of roads and trails and to determine the minimum system that can be sustained given available resources, yet still provide access without diminishing the quality of recreational opportunities such as hunting and fishing. Over time, the deterioration of the road and trail network due to inadequate resources for maintenance will present one of our major "roadblocks" to recreation.

In my experience, the quality of recreational experience is the most important factor for users of the national forests, and quality experiences are rooted in healthy, functioning ecosystems. For hunters, this may mean intact big game habitat. For anglers, it may mean clean, fishable streams. For OHV users, it may mean an interconnected system of well-maintained trails. Travel Management Planning is fundamental to achieving each of these ends.

As we look at the spectrum of outdoor recreation opportunities across the nation—from golf courses and theme parks to remote wilderness and solitude—the national forests and public lands provide a wide variety of recreation opportunities on this spectrum. For example, where else do the citizen owners of the national forests have free access to remote wild places to experience the land as our forefathers and Native Americans did? It is also important that we provide citizen owners with a broad spectrum of opportunities to access these lands, from motorized access for the physically impaired to remote wild places that provide solitude and some of the best trophy hunting and fishing in the world. The Forest Service recognized both the importance of recreation and the need to manage recreation in the context of multiple uses to achieve sustainability in developing its proposed planning rule.

The proposed rule defined sustainable recreation as "The set of recreational opportunities, uses and access that, individually and combined, are ecologically, economically, and socially sustainable, allowing the responsible official to offer recreation opportunities now and into the future."[7] The proposed rule would require plans to include components to provide for sustainable recreation, and more consistent monitoring of recreational use trends.

Included in the proposed rule's statement of purpose is to manage the National Forest System to "sustain the multiple uses, including ecosystem services, of its renewable resources in perpetuity while maintaining the long-term health and productivity of the land." This is essential. If the land is not healthy and productive, it cannot sustain multiple uses, including recreation, or the ecosystem services upon which we all rely. Furthermore, healthy watersheds are fundamental to the long-term productivity of the land. The planning rule should, in keeping with the origins of the national forest system and the mandates of the Forest Service Organic Act[8] and National Forest Management Act,[9] explicitly place water and watershed protection as the highest management priority of our national forests and grasslands.

Developing and implementing an effective planning rule has proven difficult over the decades since the passage of the National Forest Management Act. One of the issues I struggled with as Forest Service Chief is the disconnect between forest plans and the budget and appropriations process. After scores of public meetings,

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[7] U.S. Department of Agriculture, Forest Service, 36 CFR Part 219, *National Forest System Land Management Planning: Notice of proposed rulemaking; request for comment,* February 14, 2011.

[8] 16 U.S.C. § 551

[9] 16 U.S.C. § 1604(g)

extensive data collection and rigorous analysis, and heightened public expectations, plans are not consistently implemented because of this disconnect. I urge public policy makers and the Forest Service to find a way to connect forest plans with the appropriations process so that plan components, including the recreational components we are discussing today, more consistently translate into action on the land.

Former Forest Service employee and eminent wildlife ecologist Aldo Leopold once defined the "oldest task in human history" as "to live on a piece of land without spoiling it." To fulfill Leopold's vision we must all strive to become better stewards of our natural heritage. Stewardship of public lands means managing with an eye to the future, asking ourselves, "What will we want from this land in fifty years?" Unfortunately, short-term political cycles and pressure from interest groups who want a bigger piece of the pie resist this type of thinking. As we consider the regulatory approaches put in place by the Forest Service today, let us do so with an eye toward the future conditions that we desire for our public lands.

This concludes my statement. I would be happy to answer your questions.

Mr. BISHOP. Thank you.

Mr. VeneKlasen? Did I even come close to that?

Mr. VENEKLASEN. It is VeneKlasen. Thank you.

Mr. BISHOP. I wasn't even in the ballpark. Anyway, thank you for being here. You are recognized for five minutes.

STATEMENT OF GARRETT VENEKLASEN, PUBLIC LANDS COORDINATOR, NEW MEXICO TROUT UNLIMITED

Mr. VENEKLASEN. Thank you, Chairman Bishop, Ranking Member Grijalva and Members of the Subcommittee. Thank you for the opportunity to speak today. My name is Garrett VeneKlasen, and I work for Trout Unlimited in our Sportsmen Ride Right effort.

I grew up fishing and hunting on public lands across the West. Moreover, my livelihood has always been made in the outdoor field. Today I will share with you my experience as a sportsman and off-highway vehicle user on public lands in New Mexico. My past has taught me the value of managing recreation to provide for the long-term health of the land.

Seventeen years ago I purchased my first ATV. My backyard was the 1.5 million acre Carson National Forest. The public lands hunting and fishing opportunities were world class. We had tremendous herds of trophy elk and mule deer, and the populations of turkey grouse and bear were off the charts. Back then not many folks owned ATVs in northern New Mexico, and there were few, if any, rules governing the use of OHVs on national forests. Almost daily I would head into the forest on my ATV with chainsaw, GPS and topo map in tow.

Aside from more than 3,000 miles of designated motorized trails I could use, Carson was riddled with abandoned logging roads. If a designated road wouldn't take me where I needed to go, I would simply reopen an abandoned logging road or even head cross country to get to my favorite hunting or fishing spot. In a matter of years, I created hundreds of miles of my own user-created routes.

Because I was one of a handful of motorized users, my overall impact on the land was relatively insignificant, but as each year passed the number of motorized users in my country grew exponentially. Since 2003, OHV sales have tripled in the United States. Suddenly it wasn't just me and a handful of folks in the woods anymore.

Collectively, our habitat fragmenting motorized activity quickly began to degrade riparian areas, disrupt normal wildlife activity

and outrage and ultimately displace the nonmotorized recreationists that come to the Carson looking for an atavistic outdoor experience.

For a time I denied the fact that increasing offroad use was having a negative effect on the quality of my outdoor experience. With each passing season, though, the trophy quality and quantity of elk, mule deer and other game species declined dramatically. These animals do not tolerate motorized activity. They equate engine noise with predation and quickly vacate lands frequented by vehicle traffic. In a matter of years, we, the OHV community, literally drove animals off public lands and into the adjacent private lands. In the end, we literally loved our country to death.

In the fall of 2009, I attended my first U.S. Forest Service sponsored travel management meeting. At the time, I still viewed travel management from an access restricting standpoint instead of from its intended purpose, responsible resource protection. But in the room were many sportsmen like myself, folks who loved to ride but also equally cherished the nonmotorized quiet side of outdoor recreation.

We talked among ourselves and decided that we, the OHV based sportsmen's community, needed to do something to protect our local resources from overuse. We eagerly began to work with the land management agencies on travel management in our area. We used a common-sense tread lightly approach to balance adequate access with corresponding ample nonmotorized refuge country. This is truly the essence of the travel management concept.

When the travel management process finalizes in the Carson this winter the U.S. Forest Service will still retain more than 3,000 miles of designated roads and trails for motorized use. The OHV based sportsmen's community even went a step further to support the designation of several nonmotorized habitat protection areas within the Camino Real. These relatively small, contiguous tracts of nonmotorized country ensure that local wildlife populations will always have easily accessible refuge land adjacent to our designated routes.

As a result of these efforts, wildlife once again flourishes, and the Camino Real is now one of the most sought after hunting units in the entire state. The revenue generated by hunting and other nonmotorized recreation related activities in the communities surrounding the Camino Real is estimated to be $13.4 million annually and helps create and maintain more than 170 local jobs.

We have been able to achieve sustainable recreation management in my area because of our willingness to come together and work constructively as a diverse community of users. Now we are expanding these collaborative efforts through a coalition of businesses and rod and gun clubs called Sportsmen Ride Right. Our coalition believes that motorized access is a necessity, but one that must be balanced along with habitat protection to ensure the long-term health of our hunting and fishing heritage.

In summary, the increase in population use rates of our public lands indicate that we, the current stewards and trustees of our public lands, desperately need to implement a long-range travel management plan now more than ever. Kindly recognize that the offroad community is a broad-based, divergent group of users and

not just the purely recreational riders that are allowed, but minority, stakeholder within the overall OHV picture.

In states like New Mexico, the silent majority of the OHV community are sportsmen like myself who embrace a balanced, common-sense approach to motorized access and resource protection. Thank you for your time.

[The prepared statement of Mr. VeneKlasen follows:]

Statement of Garrett O. VeneKlasen,
New Mexico Public Lands Coordinator, Trout Unlimited

Chairman Bishop, Ranking Member Grijalva, and members of the subcommittee,

Thank you for the invitation to testify. My name is Garrett VeneKlasen; I am the New Mexico field coordinator for Trout Unlimited..

Today I will share with you my experiences as a sportsman and ATV user on public lands in New Mexico. My experiences have taught me the importance of balancing access with habitat protection in order to sustain healthy populations of fish and game, and quality recreational opportunities. I believe that some of the things we're doing in New Mexico show that if we work together, we can achieve that balance.

I was born and raised in New Mexico and spent my childhood and formative adolescent years hunting and fishing with my father throughout the public lands of New Mexico, Colorado and Arizona. Today, as a father, I am able to pass down our priceless outdoor heritage to my daughter because like many New Mexicans, we have a deep passion for wild places and hunting and fishing. Since I was old enough to drive a car and start a fishing guiding business at sixteen, my entire working career has centered on hunting, fishing and recreating on public lands. I've been a fishing and hunting guide, an outfitter, an outdoor writer/photographer, an outdoor travel consultant, and an outdoor television producer. All these jobs center on viable public lands resources.

Seventeen years ago, I purchased my first ATV. At the time, I was newly married and living in Angel Fire, New Mexico. Angel Fire is the gateway to amazing USFS, state and BLM public lands. My "back yard" was the 1.5 million acre Carson National Forest. The public lands backcountry hunting and fishing back then was world class. We had tremendous herds of trophy elk and mule deer. Populations of turkey, grouse and bear were off the charts. Needless to say, as a hunter, angler and OHV enthusiast, I was in heaven.

Back then not many folks owned ATVs in Northern New Mexico. If there were any rules regulating the use of these machines on public lands, they sure weren't publicized and definitely not enforced. Almost daily, I would take off from my house on my ATV with a full tank of gas, a chainsaw, a GPS and a topo map and head into the forest. Aside from more than 3,000 miles of designated motorized trails I could use, the Carson is riddled with abandoned logging roads. If a designated road wouldn't take me where I needed to go, I would simply re-open an abandoned logging road or even head cross-country to get to my favorite hunting or fishing spot. In a matter of years I created literally hundreds of miles of my own user-created routes. There wasn't a spot on the map I couldn't reach on my ATV.

Because I was one of only a handful of motorized users, the overall impact on the land was relatively insignificant. For a time, the quality of my off-bike hunting, fishing and related backcountry experiences remained true and unaffected.

But as each year passed, the number of OHV users in my country grew at an exponential rate. Since 2003, OHV sales have tripled in the United States.[1] The amount of OHV activity has increased dramatically throughout the Carson National Forest. The Camino Real district of the Carson was especially hard hit due to its proximity to Taos and the fast growing resort communities of Valle Escondido and Angel Fire. Soon it wasn't just a handful of folks traversing the countryside in OHVs. It became an army of unfettered users like me that collectively fragmented watersheds, disrupted wildlife and outraged and ultimately displaced the non-motorized users coming to the backcountry.

For a time I denied the fact that increasing off-road use was having a negative impact on the quality of my backcountry fishing and especially hunting. With each passing season though, the quality and quantity of elk, mule deer, turkey, bear and

[1] *Off-Highway Vehicle Recreation in the United States and its Regions and States: An update National Report from the National Survey on Recreation and the Environment* (NSRE): 8. Available at http://www.fs.fed.us/recreation/programs/ohv/IrisRec1rpt.pdf.

grouse declined dramatically. These animals equate engine noise with predation and quickly vacate lands frequented by vehicle traffic. In a matter of years we—the OHV community—literally drove the animals off public lands and onto adjacent private lands. During hunting season, it became a race to drive into the last remaining remote and un-fragmented backcountries, which were the only isolated islands that held the last residual unmolested game populations.

My favorite fishing spots were impacted also. Folks riding through our river bottoms left deep scars in the soft riparian soil and created mud bogs in fragile riparian areas. Some of our small creeks were even becoming scoured and channelized by frequent OHV use through their courses.

We loved our country to death.

In the fall of 2009, I attended my first Travel Management meeting held by the U.S. Forest Service (USFS) in Taos, New Mexico. At the time, I viewed Travel Management from an access-restricting standpoint instead of its intended purpose—responsible resource protection. I was extremely skeptical of the federal government regulating my off-road activity. I bought in to the rhetoric stating that the "Feds" had no right to tell an upstanding, tax-paying citizen like myself where I could or could not ride. I hated the idea of having to possibly close many of the user-created routes that I and my buddies exhaustively created and maintained for almost a decade.

But in the room were many recreationists like myself. Folks who loved to ride, but also equally cherished the non-motorized, regressive side of outdoor recreation. We talked among ourselves and decided that we, the OHV-based sportsmen's community, needed to do something to protect our resources from overuse.

And so we collectively and willingly worked with the land management agencies on Travel Management in our area. We used common sense approaches to balance adequate access with corresponding, ample non-motorized refuge country. This is the essence of the Travel Management concept. In the end, the USFS ended up closing some roads and trails, but retained more than 3,000 miles of roads and trails for motorized use. This scenario is typical across the West. There is a misconception floating around out there that Travel Management has severely restricted access across the West and this is simply not true.

I believe that the Travel Management process helps build balance for all users of our treasured national forests. I also believe, as a rider, that I could literally wear the wheels right off of my vehicle just driving the roads and trails on my local national forest alone. In fact, of the 3,400 miles of roads and trails on the Carson, more than 3,000 of those miles are open to motorized vehicles. That's a pretty good deal for the motorized user like myself.

We, the sportsmen-based OHV community in northern New Mexico, did not stop with supporting the Travel Management process. We collectively wanted to ensure that there would remain quality, easily accessible non-motorized refuge land to hunt in adjacent to our designated motorized routes.[2]

In 1973, the New Mexico Habitat Improvement Act (HIA) was implemented to protect wildlife populations and crucial wildlife habitat from unrestricted motorized vehicle travel throughout New Mexico's national forests. The idea behind the act was to create relatively small non-motorized Habitat Protection Areas (HPAs) for wildlife. These areas do not restrict motorized use by federal or state agencies and allow for special use permitting for activities such as logging.

The HPAs helped wildlife to flourish.. It is a well-documented fact that game and non-game species alike rely heavily on large, contiguous, protected, non-motorized tracts of country for food, cover and breeding habitat. In the 1980's local populations of elk, deer, turkey, bear, grouse and other game and non-game species exploded after HIA went into effect. In a very short period, the Camino Real District of the Carson became one of the most sought-after hunting units in the entire state. This was the game-rich country I first encountered when I moved to Angel Fire, New Mexico in 1994.

With the help of the local New Mexico Game & Fish Department and U.S. Forest Service personnel, we collectively identified previously-closed non-motorized HPAs within the Camino Real District of the Carson and re-closed (to motorized use) two separate HPAs in the Carson. Collectively, these two HPAs protect approximately 33,000 acres (remember the Carson consists of 1.5 million acres) of prime wildlife habitat. Please keep in mind that the implementation of these closures was instigated by the sportsmen-based OHV community, not the non-motorized community.

[2] A brief video about this work can be found at http://tightlinemedia.com/production-services/video-samples.html.

Again, it is important to note that this country was originally closed and protected under the previously-mentioned HIA, but was eventually opened back up via user-created routes. Many of these routes were created by yours truly.

After three years of closure, these two HPAs once again boast some of the finest public-land big game hunting opportunities (from both a trophy quality and quantity standpoint) in the entire state if not the entire West. Hunters, hikers, horseback enthusiasts, naturalists and mountain bikers flock to the area because of the easily accessed pristine and wild backcountry country. The revenue generated by hunting and other non-motorized recreation related activities in the communities surrounding the Camino Real is estimated to be $13.4 million annually, and helps create more than 170 local jobs.

Our experiences in New Mexico have played out in similar ways throughout the West. Sportsmen who use public lands rely on an intact and meaningful system of roads and trails to hunt and fish. We have a significant stake in the upkeep of those roads and trails, but we also need areas where we can leave the machine behind and find not just the solitude and peace that lives in wild country, but also the high quality fish and wildlife habitat that produces meat for the table and fodder for the soul.

The term "access" is a tricky one for sportsmen. Were motorized access the number one issue for sportsmen, downtown Washington D.C. or New York City would be hotspots for hunting and fishing. Sportsmen understand that access is not simply the ability to drive your vehicle uninhibited across the landscape. For sportsmen, access is about quality and opportunity. Just as urban centers loaded with roads and cars don't make quality habitat for fish and wildlife, neither do national forests overrun by unmanaged motorized recreation make good places to fish and hunt.

When the conversation turns to motorized access, non-motorized users and motorized recreationists are often split into disparate groups. For hunters and anglers, the truth is different. Nearly every sportsman who visits public lands does so in a motorized vehicle. It may be an ATV, a truck, a jeep or another four-wheel-drive vehicle, but most of us travel across Forest Service or BLM roads to reach the edges of our hunting and fishing areas.

Sportsmen also know that as you venture farther from the motors, the fish get bigger, the bucks get better and the elk get more numerous. In my state, one of the most sought-after elk tags in the West can take years to draw. Unit 16a in the Gila National Forest draws hunters from around the country and around the world to pursue trophy elk. The Gila National Forest spans 3.3 million acres, four counties and five hunting units. Once the Gila National Forest finishes it Travel Management Plan, it will have more than 3,600 miles of motorized roads and trails for use by the public and the most desirable and hardest-to-draw tag will remain the one that allows sportsmen to hunt the Gila Wilderness Area, away from motorized roads and trails.

There is broad recognition in the sportsmen's community that sound management and responsible use of public lands are necessary to sustaining quality recreational opportunities. Sportsmen are part of a broad-based, divergent off-road community which encompasses much more than the purely recreational riders that are a loud, but minority, stakeholder within the overall OHV picture. The silent majority of the OHV community are recreationists like me who embrace a balanced, common-sense approach to motorized access and resource protection within our public lands. To give voice to this majority we have started a coalition of businesses and rod and guns clubs called Sportsmen Ride Right. Our coalition believes that motorized access is a necessity, but one that must be balanced along with habitat protection to ensure the long-term health of our hunting and fishing heritage.

Sportsmen Ride Right is firmly in support of Travel Management Planning. It only makes sense that we would put thought into the impacts of motorized use on fish and wildlife on public lands. For sportsmen, travel management is no different than game laws that include season and bags limits.

Because so many sportsmen use OHVs to hunt and fish on public lands, we have the most to gain by doing it "right." To this end, Sportsmen Ride Right advocates responsible OHV use and, more importantly, a secure a strong sporting heritage for future generations.

As we consider the decisions made through Travel Management Planning, it is important that we keep in mind the size and extent of the road and trail network on public lands.

- Nearly 90 percent of all lands managed by the U.S. Forest Service are within 2 miles of a road and 78 percent of all national forest lands are within one mile of a road. 62 percent of all national forest roadless areas are less than one mile's distance from a road. Only a little over 11 percent of all national forest roadless areas are two miles or more from a road.

- In New Mexico's Carson National Forest there are over 3,000 miles of designated motorized roads and trails.
- Once travel management is complete on the Gila National Forest, there will be about 3,600 mile of motorized roads and trails on the forest. That's more miles of roads than there are residents in Catron County, where much of the Gila National Forest lies.
- In Idaho, which contains more roadless acres than any other state besides Alaska, 61 percent of all U.S. Forest Service managed land is within 1 mile of a road and 94 percent of Idaho lands designated as "general forest" by USFS are within 1 mile of a road.

Besides damaging valuable fish and wildlife habitat and limiting hunting and fishing opportunity, an excessive and redundant road system is an unneeded burden on American taxpayers. The Forest Service lacks the financial resources to maintain its system of roads and trails and faces a maintenance backlog of $8.4 billion.

With so much at stake, it only makes sense for the Forest Service to analyze its network of roads and trails at the district level and to determine the minimum system that can be sustained given available resources, yet still provide access without diminishing the quality of recreational opportunities such as hunting and fishing.

Hunting and fishing generate $76.7 billion in economic activity in the United States annually. But the number of people who engage in hunting and fishing has been dropping steadily for a generation. Today's youth are more likely to shoot ducks or catch a trout in a video game than they are for real in the outdoors. Our national forests provide critical opportunities to hunt and fish, and these opportunities cost a whole lot less than on private lands. However, these opportunities are available because we still have significant areas of land and water on our national forests that are relatively undeveloped. Areas with low road densities frequently have high aquatic and terrestrial habitat values. Conversely, hunting and fishing opportunities in backcountry areas can be compromised by high road densities and frequent motorized traffic. So if we are to keep our hunting and fishing traditions going, there has to be a good balance between motorized access and walk-in areas.

A look at how motorized access impact elk illustrates this point. Elk are one of the most popular game animals in the U.S. and their reaction to motorized roads and trails has been studied extensively. A 1983 study (Lyon) of the impact of road density on elk populations reported that "habitat effectiveness" could be expected to decline by at least 25 percent with a density of 1 mile of road per square mile and by at least 50 percent with two miles of road per square mile. This study further reported that as road densities increased to five to six miles of roads per square mile, elk use declined to less than 25 percent of potential.

Other studies have shown that closing roads benefits elk. Irwin and Peek (1979) found that road closures allowed elk to stay in preferred habitat longer while elk in roaded areas were displaced. Leptich and Zager (1991) found that closing roads extended the age structure and doubled the bulls per cow sex ratio. Gratson et al. (2000) measured elk hunter success in relation to road density and found that hunter success almost doubled when open road density was reduced from 2.54 km/km2 to 0.56 km/km2.

Just this month in California, a special state task force found that poorly built roads were doing more harm to salmon in Battle Creek than clear cutting.[3] Battle Creek, a tributary to the Sacramento River and an important spawning ground for salmon, highlights the need for planning and carefully thought out road systems.

Sportsmen, like other public land users, may disagree on specific road closures or openings. We do not, however, disagree about the need for sound management of our fish and wildlife resources. Travel Management Planning is part of sound wildlife management, and most sportsmen fully support the concept and need for designated routes.

Hunters and anglers have a long history of paying our own way and taking responsibility for our actions and for those of our peers. We will continue to work for balance and to protect the wildlife heritage that we owe to our children. We ask that Congress also seek a balance that will protect our irreplaceable public lands. Congress should not only protect the Travel Management process, but vocally support a proven policy that can save our lands and save tax dollars.

In summary, the increase in population and use rates of our public lands indicates that we—the current stewards and trustees of our public lands—desperately need to implement a long range Travel Management Plan now more than ever.

The key to the success of Travel Management is transitioning from the individualized, me, mine, here and now access-restriction mindset to a broader, ours, theirs, and tomorrow resource protection perspective. Ultimately this issue isn't just about

[3] Matt Weiser, "Battle Creek at risk from roads," *Sacramento Bee,* November 09, 2011.

us. It's about giving my unborn grandchildren (God willing) something of real value. It's about giving them the same quality public lands backcountry experience and opportunity that helped define and refine the man who now sits before you.

The wild world is one of the last truly authentic things that we can give to subsequent generations. In the backcountry, away from the modern trappings of the civilized world and all our gadgets and machinery there is only one truth to be found. It is a place where all beings are governed by a set of perfect laws that have never changed and never will. If a balanced approached to preserving and protecting this one irreplaceable commodity isn't worth protecting, I don't know what else is.

Thank you again for the opportunity to testify. Your careful and thoughtful consideration is greatly appreciated.

Mr. BISHOP. Thank you. You ended that right on the spot too.

We will start with questions for the panel. Mr. Tipton, I am betting that you have some questions, and I can guess where they are going to go.

Mr. TIPTON. Well, thank you, Mr. Chairman. You know, it just dawned on me that Utah and I think Wyoming even has marginal skiing.

Mr. BISHOP. Oh. Appreciate it. Your time has expired. We are now going to go—where is the gavel?

Mr. TIPTON. I do appreciate it, Mr. Chairman, and I thank the panel also for taking the time to be here.

Mr. Porzak, I would like to be able to do some followup. How is the Forest Service's new use and occupancy permit water clause inconsistent with Federal deference to state law and water issues in the West? I believe the Chief even spoke to Colorado water rights.

Mr. PORZAK. Yes, sir. I believe the consensus is that this is an end run around state water law because it is trying to gain Federal control over water rights that it could not obtain under its Federal reserve rights through the state water courts, and it is doing it as a permit term and condition.

Mr. TIPTON. OK. We were looking at your business, and I think you underscored a very important point during your comments saying that all water owners should be concerned. You know, in the 3rd Congressional District and in fact throughout the State of Colorado, water is what we absolutely need, particularly for the grazing end of it, but in your industry does that become part of collateral, an ability to be able to expand?

Mr. PORZAK. It absolutely does. You know, the water rights are a major source of collateral for the ski area loans that support their infrastructure, that support their improvements and their general operations. No lender is going to loan any money unless you can prove you have adequate water rights.

And when they would look at this clause they would see that, number one, the ski areas are divested of their ownership of the water right and that there is no guarantee that the water will continue to be used for the ski area purposes, so this will have a major impact on the ability to obtain your financing.

Mr. TIPTON. So that it is very clear, people paid money for these water rights, didn't they?

Mr. PORZAK. Collectively, literally hundreds of millions of dollars.

Mr. TIPTON. Hundreds of millions.

Mr. PORZAK. That is a very conservative number. I mean, some resorts have spent a number of millions of dollars just for one re-

sort, and many of these arise off the permit area and are used to augment the use of water on the permit area.

Mr. TIPTON. And under the proposed rule, the compensation for those hundreds of millions of dollars that were spent for water rights would be?

Mr. PORZAK. Zero.

Mr. TIPTON. Zero?

Mr. PORZAK. Zero.

Mr. TIPTON. So it is effectively a taking and infringing on Colorado water rights, Colorado water law——

Mr. PORZAK. No question.

Mr. TIPTON.—by the property rights?

Mr. PORZAK. No question in my mind.

Mr. TIPTON. Great. What effect will this clause have on permit holders who received their permits after the 2004 clause was adopted, which did not require the relinquishment of these water rights?

Mr. PORZAK. Right. Basically what it will do is force them to go back to water right clauses that existed prior to 2004. Basically you could have a new ski area owner who obtained the water right under the 2004 clause, thought those were the rules that were in effect, is going to be held to certain standards that existed many years before that—it could be decades before that—that they had no knowledge of and were not a party to.

Mr. TIPTON. So, basically the rules are just becoming a moving target. We are creating more uncertainty. Is this impacting jobs?

Mr. PORZAK. Very definitely. When you impact the financing you are impacting jobs. You are also impacting the balance sheet that the ski resort owners use to be able to obtain their financing. If you take away literally tens of millions of dollars from their balance sheet, that will in fact impact their ability to obtain loans and they will have to cut back on the amount of money they get and so that is going to mean loss of jobs because certain jobs are going to have to be cut.

Mr. TIPTON. I would like to go back. You mentioned this just briefly in testimony. It was a question that I directed to the Chief in terms of having that comfort level that the water will be used for that directed beneficial use, be it ski industry or grazing. You don't feel it is there?

Mr. PORZAK. No, I don't. There is language. It is not a requirement, but it says that the water should primarily continue to be used for ski area operations without defining what those operations would be, but the operative word is primarily. You know, what does that mean? You can divest them of 49 percent of their water, which could have a major impact on ski area operations? Not just the snow-making. I mean, that is the one everybody thinks about. But it is all the residential and domestic uses associated with a ski resort.

Mr. TIPTON. OK. Thank you, Mr. Chairman. I did neglect. I think even Nevada has one ski run. No? OK.

Mr. BISHOP. Thank you. Thank you, Mr. Tipton. When the government stops Colorado from making snow, maybe we can work out a plan to get the greatest snow on earth shipped over to you in some way and you can continue going.

Mr. Grijalva?

Mr. GRIJALVA. Thank you, Mr. Chairman. Chief Dombeck, I have to ask you, in your written testimony you say, "If access means motorized access without limits, then Times Square should be a great hunting ground." Could you elaborate on that, please?

Mr. DOMBECK. Well, I am not sure I said it quite that way, but the assumption that I heard earlier at this hearing is that access assumes motorized access.

The fact is that the national forests are in most of the landscape—I would say 99 percent of the land is accessible and open. The question is do we want every acre, every single situation, open by all means of access that are available to us today that we may not have had 30, 40 or 50 years ago, so that is I think the important consideration. How many roads, how many trails do we really need?

What about the person that likes the solitude? I hear a lot from Forest Service retirees or I used to when I was in the hot seat and got all the questions like Chief Tidwell did, and in fact I am glad I am not in that hot seat today at this hearing, but they will talk about solitude. It seems to me there needs to be a little bit of dialogue on that to balance out the equation.

Mr. GRIJALVA. Yes. Let us talk a little bit about balance if I may, Chief. The criticism today, and it will go on, with the proposed rule appears to be that it favors preservation and conservation over other use. Is it possible that what is really going on is that that use has been favored, the other use, over conservation for too long and the agency is seeking some balance to the mandate, to the multi-use mandate?

Mr. DOMBECK. Well, you know, I don't mean to get dramatic, but it was President Theodore Roosevelt that used the term that we have skimmed the land, and in fact much of the forested landscape where I live, for example, in the Midwest, the national forests are in better shape today than they were decades ago because they have recovered and continue to recover.

And when we look at that, I hope we look at some of the basics like the formation of topsoil, water quality, aquifer recharge, all of those kinds of things that are equally important because if we don't take care of that over the long haul we will end up with significant problems.

There is a wonderful paper that was written in 1953 by then the Associate Director of the Soil Conservation Service where President Franklin Roosevelt had him travel around the country or the world during the Dust Bowl era to determine what caused the collapse or the degrading of countries, civilizations. And interestingly enough, his conclusion was it was soil and water or at least lack of stewardship of soil and water.

And that is not to say that the balance is very important and I am not implying that human livelihoods are not important, but oftentimes it seems to me we ought to err in favor of the land. I think that is what most land stewards do. I think most ranchers want to do that. I certainly do as a landowner if there is a question.

Mr. GRIJALVA. Thank you. Thank you. Mr. VeneKlasen? I hope I said it right. A quick question. Do you believe that a well thought out travel management process can improve hunting and fishing

opportunities while maintaining the access for OHV and ATV users? It has been brought up as a conflict by a previous witness, but I think there is a brewing conflict between hunting and fishing and the demand by motorized vehicle users that we open up everything.

Mr. VENEKLASEN. You know, I think the Camino Real district of the Carson National Forest is a perfect example of how we have balanced access and resource protection. When we had excessive motorized use and unfettered motorized use, the quality of hunting degraded markedly.

I was there before we had a lot of offroad use. I was there during the process and actually one of the users causing the problem, and then afterward we created these habitat protection areas that were 10,000 acres that are nonmotorized, but they are surrounded by lots of good motorized trails.

The hunting opportunities in those areas are unbelievable. We just finished a 12-minute video, which I would be happy to send you, that illustrates that very clearly. The quality, trophy quality, has increased incredibly in two years, and the quality and numbers of animals has increased exponentially also, and so I think that that is a perfect example of how that works.

Mr. GRIJALVA. Thank you. Thank you, Mr. Chairman.

Mr. BISHOP. The gentleman from Nevada. Do you have questions for this panel?

Mr. AMODEI. Thank you, Mr. Chairman. Dr. Dombeck, do you have any opinions on the policies regarding water rights that you have heard here today in terms of making the actual transfer of those a predicate to authorizing use, either recreational or livestock, based on your experience?

Mr. DOMBECK. Actually I would prefer to leave the details. I know how complex water law is, and it is different in every state and I certainly don't understand the details of it, but I would hope we arrive at some sort of balance and the concept of keeping water on the land for all the uses I think is very important to keep the streams and the aquifers connected with the needs of the plants, animals, fish and people that are on that land.

Mr. AMODEI. Well, do you have an opinion regarding who needs to own that water for that objective to happen?

Mr. DOMBECK. I would say in many cases the landowner and in some cases the water rights on the public properties as well, but primarily the landowner.

Mr. AMODEI. Thank you. Mr. Dahl, do you have anything to add regarding the water rights issues that have been discussed by those states that wish they had skiing facilities as nice as those around the Lake Tahoe Basin?

Mr. DAHL. Well, I heard Chief Tidwell say this morning that we can't furnish grazing unless we furnish the water, but that doesn't mean that the Federal Government needs to own the water.

In Nevada, we have a law that says that the agencies cannot use someone else's property, livestock in that instance, to prove beneficial use on the water. And in Nevada, and I think this is the case in a lot of the western states, the BLM is adhering to our state law.

Forest Service is trying to do an end run on it. They are holding up a lot of permits. If you want to go out and repair a water system

or put in a new one and you need a permit to do that, then they want their share of the water, half of the water, in order to do it.

What it does, it is a given in Nevada that the wildlife is able to use any water that is developed, and so by them holding up water developments they are hurting wildlife for one thing. And a rancher who puts a water development in with his own resources wants the security of owning the water because if half that water belongs to the Forest Service, then if they move him out, they have water. They can give that water that he developed to somebody else.

Mr. AMODEI. And I think a distinction that is important here, is it your understanding that this policy applies—I am not asking for Federal funding for water improvements on the range. This is being used as a predicate to allowing you to expend your own funds in support of your existing grazing rights on the forest?

Mr. DAHL. Right. If you would want to go out and spend your own funds to develop the water yourself, you are held up from being able to do that, to better be able to manage the forest and be able to utilize the feed, the forage and so on and make more water available for everybody, for the wildlife along with your own livestock.

Mr. AMODEI. Are you aware of any instances in your experience of the Forest Service owning cattle or sheep or anything else that they are grazing in their own name on——

Mr. DAHL. No. No. They do have camps and they keep a couple horses there sometimes and they do have water rights for that, and that is OK, but our law says you can't use somebody else's property to prove beneficial use, and that is necessary in order to acquire the water right.

Mr. AMODEI. And if I can briefly, can you visit the issue of—back to the travel management plan—if you own a private right-of-way in the forest, what is your understanding of the present proposed travel management plan for the Humboldt-Toiyabe in terms of that being part of the travel management plan?

Mr. DAHL. Well, we have a unique situation, and maybe not to other areas, but the Ruby Mountains, for instance, have a lot of ranches around them. This is private property. And a lot of people use the mountain by going to the rancher that owns the property and saying can I go across your property. We figure about 90 percent of the ranchers allow people to go across.

Now the idea that the Forest Service is doing at least in our travel management plan is to close all roads that go off of private land and so then it is the Forest Service. It is not the property owner that is locking up the forest because the property owner in 90 percent of the cases will let somebody go if they are able to tell them close the gate, watch out, it is too muddy today, you will mess up the road or whatever.

Mr. AMODEI. Thank you. Thank you, Mr. Chairman.

Mr. BISHOP. Thank you. Ms. Lummis, do you have questions for this panel?

Mrs. LUMMIS. Thank you, Mr. Chairman. I do have one, and I appreciate your indulging my attendance today.

Could any of you answer why does the Forest Service want to take these water rights away from the private owners?

Mr. DAHL. That is a good question. I don't have an answer to it.

Mr. PORZAK. Control.

Mr. DAHL. Yes. Control. I would concur with that.

Mrs. LUMMIS. Mr. Dombeck, do you agree? You have been in these shoes before.

Mr. DAHL. Pardon? Oh, I am sorry.

Mr. DOMBECK. Obviously I am not familiar with the current situation and the issues, but what I can assure you from one that grew up 25 miles from a town of 1,500 in a very rural area, although it was big woods and not the prairie or the Great Basin, that the Forest Service and BLM employees that I worked with are really dedicated to the resource and doing the right thing. Now keep in mind multiple use management is a tough mandate.

Mrs. LUMMIS. I hear you.

Mr. DOMBECK. It is very difficult.

Mrs. LUMMIS. But why? I mean, do you——

Mr. DOMBECK. I don't see it as a willful thing, someone wanting to take something away from somebody else. I see it as the desire of the agency wanting to do what they feel is the right thing for the land.

Mrs. LUMMIS. OK. So it may be a control issue. Mr. Dahl, do you think it is about control?

Mr. DAHL. Yes, I think it is a control issue. You know how important water is in Wyoming.

Mrs. LUMMIS. Yes.

Mr. DAHL. It is the same in Nevada, maybe more important in Nevada.

Mrs. LUMMIS. Yes.

Mr. DAHL. And it definitely would be a control issue because you have to have the water to go with your permit if you are running livestock.

Mrs. LUMMIS. Yes. Now, if you had, for example, a tank that caves in, it erodes and you want to go in and repair it, a water tank, you need a permit to do that?

Mr. DAHL. In most instances.

Mrs. LUMMIS. And it is not automatically renewed?

Mr. DAHL. That is right. That is right. It is not an automatic thing.

Mrs. LUMMIS. In spite of the fact that wildlife utilizes these water resources as well?

Mr. DAHL. Yes. Well, in Nevada, the law provides that wildlife are able to use any water rights that are developed on public land.

Mrs. LUMMIS. Mr. Chairman, I do appreciate your indulgence of my questions. I came today because of this water issue specifically. The other issues are alarming as well, but nothing as much as the Federal Government taking water rights away from people who own them now. To me, that is unacceptable, and I just wish to register my complete disapproval of that portion of the rules that are being discussed. Thank you, and I yield back.

Mr. BISHOP. Thank you. Mr. Porzak, maybe I can ask you the question that was asked of Chief Tidwell a little bit earlier. I am sure you are aware of the task force back in 1996. From your perspective, are the proposed new water clause consistent with what the task force concluded back then?

Mr. PORZAK. I am very familiar with that task force report, and it is totally inconsistent. That did not just address the issue of bypass flows as was indicated. In fact, the 2004 clause expressly prohibited the use of the water rights being used for bypass flows. That prohibition is gone from the new clause.

Mr. BISHOP. Well, welcome to the world of regulatory takings.

Mr. PORZAK. Yes, sir.

Mr. BISHOP. Commissioner, if I could ask you a couple questions about the road situation that you all have.

In the written testimony, you stated that Elko County commissioned an economic analysis of the travel management plan. The impact was up to $132 million to the county. Did you get any response from the Forest Service to the result of your analysis?

Mr. DAHL. No, we haven't.

Mr. BISHOP. Nothing at all?

Mr. DAHL. Nothing.

Mr. BISHOP. Are any of these roads 2477 roads?

Mr. DAHL. Yes, many of them are. You know, something that we are——

Mr. BISHOP. I am talking about the roads scheduled to be vaporized and closed. Are they 2477 roads?

Mr. DAHL. Some of those are. Some of them. Probably not the majority of them. The majority of the roads that are closed and the majority of the roads, and I am anxious to go back and see if we can get some kind of a figure on the number of miles of roads that are maintained because most of the roads out there are only maintained by use.

Mr. BISHOP. I am interested, though, in those 2477 roads that were among that list. Was there any suggestion by the Forest Service they would relook or react differently to those particular roads?

Mr. DAHL. Well, the only thing we can do is see what has happened to counties where the plan is already in place.

In Eureka County, they have roads that have been used that on their historical plat maps they can verify that those roads have been used for 120 years and they have been closed. They have asked for them to be opened, and they haven't opened them.

Mr. BISHOP. I understand the concern you all have out there, and I think it is a legitimate one. Someone gave me the book, I can't remember the title, about the big burn up in Montana and Idaho that destroyed towns and killed people.

I think one of the things that was not actually written specifically at the conclusion of that book but was very clear is one of the problems that the Forest Service in its infancy at that time had in fighting those is they didn't have access. There were very few roads that were in that forest area, and they were prohibited from going into the areas where they needed to. Had they done so, the situation could potentially have been significantly different. Access is a significant issue on public lands for the public as well as for those who have private property or private concerns in which they need that particular access, so that is one of the concerns.

Chief Dombeck, if I could just ask you one question here. You talked about how our goals have to be 50 years or 20 to 50 years in advance. Do you think that the legislature that enacted the Multiple Use Sustainment Act or ASA or the NEPA Act conceptually

20 or 50 years ago envisioned the national forests that we have today with the significant fire depredation and the bark beetle issues and the other kills and the overgrowth? Do you think that was actually what they were envisioning when they passed those laws?

Mr. DOMBECK. Well, I can only speculate, but over the decades we have made both good and bad policy decisions based upon the current thinking of the day, so I am assuming that was the thinking at the time.

Mr. BISHOP. Were you the Chief that gave us the roadless rule?

Mr. DOMBECK. Yes, I was.

Mr. BISHOP. Shame on you. Do you also know Robert Nelson from the University of Maryland?

Mr. DOMBECK. Yes, I do.

Mr. BISHOP. He has written some great books about the history of those departments, just slightly different than some of the things that we have been hearing in recent developments.

Let me ask one last question of Commissioner Dahl. This is an unfair question to you I admit, but you are somebody who has to administer rules and regulations as well as state law. We were talking about the new policy that was written. The old rule told the Forest Service that they shall be administered for outdoor recreation, range timber, watershed and wildlife and fish purposes.

The new proposed rule tells them that a range of social, economic and ecological benefits for the present and into the future, including clean water habitat for fish, wildlife and plant communities and opportunities for recreation, spiritual, educational and cultural sustenance need to be maintained.

As an administrator, that new language that is being proposed, would that give you any kind of pause on how you would be able to administer that kind of language?

Mr. DOMBECK. That would. My first consideration would be for the economic welfare of my county and for the opportunity of the citizens that live in the county to utilize the forest in the ways that they have in the past.

Mr. BISHOP. OK. Thank you, Commissioner. You actually gave a better answer to my hypothetical question than I was anticipating. I appreciate that.

Are there other questions for this panel? Mr. Tipton?

Mr. TIPTON. I do have just one more, Mr. Chairman.

Mr. Porzak, could you maybe give us a little bit of insight? I would be interested, going back to Powderhorn or the powder company that is trying to develop a ski resort. How many jobs are potentially at risk since they have the potential now maybe to not be able to have the collateral?

Mr. PORZAK. The Powderhorn Ski Area is near Grand Junction, and it has not been open and not operated successfully for a number of years. A number of people have come in with both the expertise to manage a ski area and also the financial resources to really do improvements.

The Forest Service when they issued this new directive last week basically gave the Powderhorn Ski Area no alternative but to agree to the new permit language. They asked that there be a reservation of rights so that if the language is subsequently changed through

congressional action, court action or by mutual agreement that the new language would follow, and the Forest Service refused.

Mr. TIPTON. Just a clarification. So, we are enforcing a rule that has not been approved?

Mr. PORZAK. That is correct. They are absolutely enforcing that upon the Powderhorn Ski Area. You know, it is snowing now and they want to open fairly soon, and so this would be the totality of the ski resort, so it would be every job associated with that ski area.

Mr. TIPTON. That is very interesting. I appreciate you bringing that to light.

Just one more followup. It was my general understanding that out of the 2004 rule and part of this review process it was to be able to create a little clarification. I am gathering from you, is it your assumption that this proposed rule is now far exceeding what anybody was able to visualize and has some negative impacts?

Mr. PORZAK. Absolutely. There is very little relationship between the 2004 clause and the proposed new clause that the Forest Service has issued.

I mean, just look at the original 2004 clause, which I had a hand in working out with the Forest Service. It was literally two clauses. It was less than one page. The new directive is nine pages.

Mr. TIPTON. I appreciate that. Mr. Chairman, we I hope share the same view. I find this very disturbing that we have a proposed rule that is in fact a rule that is already impacting jobs, already being enforced, and I deeply appreciate your willingness to include this in this hearing. I think it is incredibly important for my state and ultimately yours and the rest of our counterparts. Thank you.

Mr. BISHOP. Thank you. Mr. Amodei, do you have any other questions for this panel?

Mr. AMODEI. No. Thank you, Mr. Chairman.

Mr. BISHOP. Thank you. With that, then we want to thank the gentlemen who have been on this particular panel for your testimony, for taking the time and effort to come and join with us today in what has turned out to be a rather long hearing but a significant hearing as well. Once again, your written testimony will be included. If indeed there are other questions—they may be coming to you—we would ask for a response at some particular time.

If there are no other questions, and once again, with a great deal of gratitude for all of the witnesses who have come here and spent your time with us, the hearing record will be open for 10 days to receive any other questions or responses, and if there is no objection or further business, the Subcommittee will stand adjourned.

[Whereupon, at 1:06 p.m., the Subcommittee was adjourned.]